Petition

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In the

Supreme Court of the United States

OCTOBER TERM 1981

NO. _____

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, GAS RESEARCH INSTITUTE, NORTHERN DISTRIBUTION GROUP, AMERICAN GAS ASSOCIATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December, 1981

QUESTIONS PRESENTED

1. Whether the jurisdiction of the Federal Energy Regulatory Commission (FERC) under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, to establish rates for natural gas companies, as defined in Section 2(6) of the NGA, 15 U.S.C. § 717a(6), for the transportation and/or sale for resale of natural gas in interstate commerce extends to reviewing and approving or disapproving the research, development and demonstration (RD&D) budget and five year RD&D plan of a research institute which the FERC previously found not to be a natural gas company within the meaning of Section 2(6) of the NGA, 15 U.S.C. § 717a(6).

2. Whether the jurisdiction of the FERC under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, to establish rates for natural gas companies for the transportation and/or sale for resale of natural gas in interstate commerce extends to requiring end-users of natural gas to pay a surcharge to fund in advance costs associated with research, development and demonstration (RD&D) of such items as synthetic gas and gas heating, cooling and cooking systems or appliances for industrial, commercial or residential use, which items are not subject to regulation by the FERC under the NGA and will not be used in the jurisdictional business of natural gas companies.

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PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

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FEDERAL ENERGY REGULATORY COMMISSION, GAS RESEARCH INSTITUTE, NORTHERN DISTRIBUTION GROUP, AMERICAN GAS ASSOCIATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Public Utilities Commission of the State of Colorado respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 24, 1981. After an enlargement of time was granted, a petition for rehearing was filed on September 14, 1981, which was denied on October 6, 1981.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 660 F.2d 821. Opinion

No. 64 of the Federal Energy Regulatory Commission in relevant part appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit affirmed Opinion No. 64 which was entered by the Federal Energy Regulatory Commission in Docket No. RP79-75. This petition for a writ of certiorari was filed within ninety (90) days after the United States Court of Appeals for the District of Columbia Circuit denied Petitioner's petition for rehearing. This Court's jurisdiction is invoked under 27 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15

Section 717(b) and (c). Necessity for regulation of natural gas companies
Section 717a(6). Definitions
Section 717c. Rates and charges; schedules; suspension of new rates

The verbatim texts of these statutory provisions are set forth in the Appendix hereto.

STATEMENT OF THE FACTS

On June 4, 1979, the Gas Research Institute (GRI) filed an application with the Federal Energy Regulatory Commission (FERC) requesting advance approval of GRI's 1980-1984 five-year research, development and demonstration (RD&D) plan and its $58,000,000 RD&D program and budget. The FERC assigned Docket No. RP79-75 to GRI's application. GRI stated in its applica-

tion that it was filing said application pursuant to Sections 4, 8, 15 and 16 of the Natural Gas Act, 15 U.S.C. § 717c, 717g, 717n and 717o; and Section 154.38, subsections (d)(5)(i) through (v) thereof of the Commission's regulations under the Natural Gas Act, 18 C.F.R. § 154.38(d)(5)(i) through (v).

GRI requested that the FERC approve its application and permit member interstate pipeline companies subject to rate jurisdiction by the FERC to collect a "General R & D Funding Unit" of 5.0 mills per Mcf during 1980 in order to finance GRI's 1980 research, development and demonstration program.

Subsequent to the filing by GRI of its application, the FERC, on June 8, 1979, caused to be issued a Notice of Annual Application. The notice provided, among other things, for the filing of comments, protests or petitions to intervene.

In response to the notice of the FERC, the Colorado Public Utilities Commission (Colorado Commission) filed Comments with respect to the application of GRI. In its Comments, the Colorado Commission asserted that (1) the FERC had no jurisdiction to entertain the application filed by GRI because GRI was not a natural gas company over which the FERC had ratemaking jurisdiction under the Natural Gas Act, and (2) a large number of the research and development or research, development and demonstration projects that were selected by GRI were outside the jurisdiction of the FERC under the Natural Gas Act and would never be utilized by natural gas companies in their jurisdictional business; thus the FERC could not lawfully require natural gas users to find such research and development or research, development and demonstration.

On October 2, 1979, the FERC issued Opinion No. 64 entitled "Opinion and Order Amending and Approving Gas Research Institute's 1980 Research and

Development Program and Related Five-Year Plan for 1980-1984." In Opinion No. 64, the FERC rejected the arguments made in the comments filed by the Colorado Commission and approved GRI's application as modified by the FERC.

On October 31, 1979, the Colorado Commission filed an Application for Rehearing of Opinion No. 64.

On November 30, 1979, the FERC issued a Notice of Denial of Rehearing.

GRI was incorporated in Illinois on July 8, 1976 under the General Not For Profit Corporation Act. GRI does not engage directly in research, development and demonstration activities. Instead, GRI is a planning and managing organization. It engages in research and development, or research, development and demonstration through contracts with laboratories, universities and corporations. GRI was formed to continue research, development and demonstration formerly engaged in by the American Gas Association. Membership in GRI is open only to interstate pipeline companies (Interstate Pipeline Company Member Class), investor-owned distribution companies or intrastate pipeline companies (Distribution Company Member Class) or municipal or other governmentally owned distribution systems (Municipal Utility Member Class). GRI, in 1979, was governed by a board of directors of 25 members, consisting of GRI's president, 12 members from the Interstate Pipeline Company Member Class, 10 members from the Distribution Company Member Class and two members from the Municipal Utility Member Class. Members of GRI provide none of the funding for research and development, or research, development and demonstration. Funding for GRI is fixed by a funding formula adopted by two-thirds vote of the board of directors based upon gas sales and transportation services of each member, to be collected ultimately from the consumers of natural gas.

In 1980, GRI proposed research and development, or research, development and demonstration in the following areas: synthetic gas manufactured from such feedstocks as coal, oilshale, land and based biomass; gas fired heat pumps, furnaces, heat recovery systems, appliances, residential and commercial cooking equipment; infrared and catalytic burners; ignition and control systems for gas appliances; integrated furnace-water heaters; 40 Kw electric power plants powered by fuel cells; low NOx multifuel burners; industrial burner control systems; ceramic fiber insulated furnaces; ladle preheating systems; glass melting hardware, multifuel combustion hardware and processing systems for textile application; solar heating and cooling systems; solar augmented water heaters, heat pumps and residential appliances; and solar-augmented systems for industrial application.

No aspect from research and development, to manufacture, to marketing, to the use of the above-described appliances, systems, etc. come within the scope of the Natural Gas Act as set forth in said Act.

REASONS FOR GRANTING THE WRIT

1. THE OPINION OF THE COURT OF APPEALS FOR THE D. C. CIRCUIT MISAPPLIED OPINIONS OF THIS COURT TO THE FACTS IN DOCKET NO. RP79-75 RELATING TO THE FERC'S RATEMAKING AUTHORITY UNDER SECTION 4 OF THE NGA.

This Court defined the scope of the jurisdiction of the Federal Power Commission (FPC) under Section 1(b)

of the NGA, 15 U.S.C. § 717(b) as follows:

> This section determines the Act's coverage and does so in light of the situation existing at the time. Three things and three things only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507, 516 (1947). The FERC is the successor agency to the FPC as to regulation of natural gas companies under the NGA. 42 U.S.C. § 7101 *et seq.*

The D. C. Circuit Court was favorably impressed by the array of GRI's research and development, or research, development and demonstration aimed at the ultimate manufacture and use of gas efficient appliances and synthetic gas to augment natural gas supplies. As a result, it rejected the first argument made by Colorado, stating:

> We find such argument to be unduly restrictive and to exalt form over substance.
>
> FERC does not seek to regulate that over which it has no statutory authority, but seeks to simplify the application procedures for these companies over which it does have jurisdiction.

This statement simply ignored the facts in Docket No. RP79-75. In both Opinion No. 11 and Opinion No. 64, the

FERC found that even though GRI was not a natural gas company within the meaning of Section 2(6) of the Natural Gas Act, FERC nevertheless had ratemaking jurisdiction over GRI. In Opinion No. 64, the FERC wrote:

> Subsequently in Opinion No. 11, the Commission found that GRI is not and does not propose to become a "natural-gas company" but is an "RD&D organization" within the meaning of the Commission's Regulations and, therefore, subject to the Commission's "continued . . . ratemaking jurisdiction" under section 4 of the Natural Gas Act.

The application filed by GRI in Docket No. RP79-75 was filed under Sections 4, 8, 15 and 16 of the Natural Gas Act. The purpose of GRI's application in Docket No. RP79-75 was to seek *regulatory* approval by the FERC of its five year 1980-1984 research, development and demonstration plan and 1980 program. The *quid pro quo* in the arrangement was that GRI (a non-natural gas company) would submit itself, its budget and its RD&D activities to FERC regulation in return for which the FERC guaranteed consumer financing through the FERC's Section 4 ratemaking authority.

The generic procedure for determining area rates, and later the national rate, which the D. C. Circuit Court used as like examples to justify the FERC's entertaining GRI's application was erroneous. Area, and later national, ratemaking by use of a so-called "generic proceeding" was adopted by the FPC after the FPC administratively was unable to process on a case-by-case basis rate applications filed by the thousands of natural gas producers. Producers, unlike GRI, are natural gas companies within the meaning of Section 2(6) of the NGA. Thus, they were and are subject to Section 4 ratemaking jurisdiction of the FPC and FERC. Neither the FPC, nor the FERC has used the rulemak-

ing, generic procedure for prescribing rates for the 29 interstate pipeline companies referred to by the D. C. Circuit Court in its opinion. Ratemaking under the NGA for these 29 pipeline companies has always been on a case-by-case basis.

The FERC's purpose in requiring RD&D organizations, such as GRI, to file applications of the nature filed by GRI in Docked No. RP79-75 was not to "cut red tape" as indicated by the D. C. Circuit Court, but to promote research, development and demonstration by providing prior approval and guaranteed prior consumer financing.

The D. C. Circuit, in its opinion, correctly characterized the second point of the Colorado Commission's argument as:

> Petitioner argues that the Natural Gas Act gives FERC no jurisdiction over development and manufacture of improved gas appliances, furnaces, water heaters, electric power plants, solar energy, or synthetic fuels, and that these items are not intended to be and never will be purchased by a natural gas company and used in its jurisdictional business.

The D. C. Circuit Court answered the above argument of the Colorado Commission by stating:

> We find that the Supreme Court on numerous occasions has held that the FERC, and its predecessor FPC, may take into consideration nonjurisdictional items when setting jurisdictional rates.

The D. C. Circuit Court cited as example *FERC v. Pennzoil Production Co.*, 439 U.S. 508 (1979); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635 (1945); *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945);

and *Federal Power Commission v. United Gas Pipe Line Co.*, 386 U.S. 237 (1967).

The D. C. Circuit's response and the cases cited reveal the Court's misunderstanding of the above opinions of this Court, the facts in Docket No. RP79-75 and the Colorado Commission's argument.

In *FERC v. Pennzoil Producing Co., supra*, royalty payments made by the producers, Pennzoil Producing Co. and Shell Oil Co., were part of the costs of the natural gas which the producers sold to United Gas Pipe Line Co. for resale in interstate commerce. 439 U.S. at 510. The "non-jurisdictional" royalty payments became part of the expenses, not only of Pennzoil and Shell, but also of United in providing "jurisdictional" service. The Colorado Commission stated in its reply brief to the D. C. Circuit Court that it was cognizant that many "non-jurisdictional" costs were included in the rates a natural gas company charged in its "jurisdictional" business. The Colorado Commission stated, however, that that was not the issue it was raising by its argument. The issue was whether the FERC had jurisdiction to include in jurisdictional rates, expenditures of a "non-natural gas company" in "non-jurisdictional" areas, which expenditures would never become part of the costs of a natural gas company in providing "jurisdictional" service.

In the *Pennzoil* case, *supra*, royalties costs became part of the cost of natural gas for United. The FERC had jurisdiction over both United and the rates it charged for natural gas sold for resale in interstate commerce. In the instant case, no step in the whole process, from the research and development to the manufacture and sale of the gas appliances involved will become part of the jurisdictional business of a natural gas company, or otherwise come within the FERC's jurisdiction under the Natural Gas Act.

The D. C. Circuit Court stated in its opinion with respect to *Panhandle Eastern Pipe Line Co. v. Federal Power Commission, supra,* that:

> The Supreme Court held that although the Commission lacked the authority to fix rates for direct industrial sales, it could take those rates into consideration when fixing the rates for interstate wholesale sales which were subject to its jurisdiction.

Like the above, this quotation by the D. C. Circuit was irrelevant to the argument. The argument was that it is beyond the FERC's jurisdiction to include, in jurisdictional rates, costs that will never become part of the costs of a natural gas company in its jurisdictional business. As a matter of fact, the *Panhandle Eastern Pipeline* case, *supra,* supported Petitioner's argument:

> We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates [jurisdictional rates] of a company whose activities embrace both. Otherwise the profits and losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act.

324 U.S. at 641-642.

Colorado Interstate Gas Co. v. Federal Power Commission, supra, involved circumstances similar to those in the *Pennzoil* case, *supra,* i.e. "non-jurisdictional" costs which became part of the costs of providing "jurisdictional service."

The D. C. Circuit's statement in its opinion,

> Thus, allowing a rate adjustment for some factor over which FERC does not have jurisdiction does not automatically mean the rate is unjust and unreasonable

indicates that the D. C. Court misunderstood the distinction between a non-jurisdictional cost which becomes part of a natural gas company's jurisdictional business and a non-jurisdictional cost which does not become part of such company's jurisdictional business. The FERC may include as a cost of service the cost of facilities or services provided to a natural gas company which are used in its jurisdictional business, whether or not the facilities or services provided to the natural gas company are within the regulatory jurisdiction of the FERC. That was not the point of the argument. In setting jurisdictional rates, the FERC exceeds its jurisdiction if it includes as a cost of service the cost of facilities or services provided by non-jurisdictional entities which facilities or services are not intended to, or ever will be, provided to a natural gas company for use in its jurisdictional business.

2. THE OPINION OF THE COURT OF APPEALS FOR THE D. C. CIRCUIT IS INCONSISTENT WITH A SIMILAR CASE OF SAID CIRCUIT REVIEWED ON THE SAME ISSUE.

The D. C. Circuit Court's opinion below is in conflict with its opinion in *Office of Consumers' Counsel v. Federal Energy Regulatory Commission*, 655 F.2d 1132 (1980). In both the *Consumers' Counsel* case and the instant case, the FERC used its Section 4 ratemaking powers to require ratepayers to finance non-jurisdictional business activities of natural gas companies. In both the *Consumers' Counsel* case and the instant case, the FERC found that the projects involved were appropriate research, development and demonstration

projects pursuant to Order No. 566 of the FPC and subject to NGA Section 4 rate treatment. In the *Consumers' Counsel* case, the D. C. Circuit Court held that the FERC exceeded its Section 4 jurisdiction when it attempted to arrange ratepayer financing of the research, development and demonstration involved therein: a non-jurisdictional coal gasification plant. In the instant case, the D. C. Circuit Court held that the FERC did not exceed its Section 4 jurisdiction in arranging ratepayer financing of GRI's research, development and demonstration of non-jurisdictional gas facilities and gas appliances.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the D. C. Circuit Court of Appeals.

Respectfully submitted,

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December, 1981

Appendix

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon, and
George R. Hall

Gas Research Institute Docket No. RP79-75

OPINION NO. 64

OPINION AND ORDER AMENDING AND APPROVING GAS RESEARCH INSTITUTE'S 1980 RESEARCH AND DEVELOPMENT PROGRAM AND RELATED FIVE-YEAR PLAN FOR 1980-1984

(Issued October 2, 1979)

INTRODUCTION AND BACKGROUND

The Gas Research Institute (GRI) has asked the Commission to approve GRI's 1980 research and development program and the related five-year plan for 1980-1984. GRI's proposed budget for its 1980 program is $57,984,000, of which $54,745,000 will, if the Commission approves, be collected by permitting GRI's jurisdictional members to include in their rates during the period January 1, 1980, to December 31, 1980, a charge of 5.0 mills per Mcf (GRI's "funding unit") on the sale and transportation of natural gas.

Twice GRI has sought and received Commission approval of its annual programs and related five-year plans. Before the Commission approved the first program and plan, the Federal Power Commission, on June 3, 1977, issued Order No. 566, to stimulate research and

development efforts of jurisdictional companies by clarifying the Commission's rate review and accounting procedures and providing an opportunity for simplified proceedings before the Commission by allowing advance approval of the research and development programs of organizations deriving financial support from jurisdictional companies. Order No. 566 established sound and comprehensive planning of research programs as the test for granting advance approval of research and development (R&D) expenditures, recognized participation in full-scale demonstration facilities (under certain conditions) as a justifiable R&D expenditure, and assured Commission review and decision at an early planning phase of R&D development whenever advance approval is requested.

GRI was incorporated on July 8, 1976, under the General Illinois Not for Profit Corporation Act. GRI does not engage directly in research, development and demonstration activities. It is a planning and managing organization which engages in such activities through RD&D project contracts with laboratories, universities and others. As of March 1979, GRI had 190 members — 28 interstate pipeline members, 136 distribution company members, 24 municipal utility members, and two associate members.

* * * * *

Colorado has attacked GRI's application on the grounds that: (1) GRI is not a "natural-gas company" within the meaning of section 2(6) of the Natural Gas Act and the Commission therefore has no jurisdiction under the Act to hear GRI's petition; and (2) even if the Commission does have such jurisdiction, a large proportion of the project areas covered by GRI's 1980 program pertain to matters which are beyond the Com-

mission's direct regulatory authority, and therefore may not be funded through Commission-sanctioned jurisdictional rates.

Colorado's arguments against our jurisdiction ignore the history of Commission action in authorizing and encouraging cooperative industry-wide research and development activities in the natural gas industry. In Order No. 566, the Commission amended its regulations to allow advance approval of the research and development programs of organizations deriving financial support from jurisdictional companies. Order No. 566 added a new section 154.38(d)(5)(ii) which described this procedure and specifically stated that "[a]pproval by the Commission of such RD&D program shall constitute approval of individual companies' contributions to the RD&D organizations." Subsequently in Opinion No. 11, the Commission found that GRI is not and does not propose to become a "natural-gas company" but is an "RD&D organization" within the meaning of the Commission's Regulations and, therefore, subject to the Commission's "continual . . . rate-making jurisdiction" under section 4 of the Natural Gas Act. GRI is subject to this jurisdiction because the funds collected by GRI's individual jurisdictional members to finance its RD&D activities are collected from consumers as part of the rates of these individual jurisdictional members over which the Commission exercises unquestioned jurisdiction pursuant to section 4 of the Act. The fact that the R&D financed by the surcharge on jurisdictional rates is conducted by GRI rather than by the individual jurisdictional members themselves does not defeat what is otherwise clearly within the Commission's jurisdiction.

Colorado's alternative argument is equally invalid. The Commission's Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act defines "Research, Development and Demonstration" as

> . . . expenditures incurred by natural gas companies *either directly or through another person or organization (such as research institute . . .)* . . . in pursuing research, development, and demonstration activities . . . . Such . . . costs should be *reasonably related to the existing or future utility business,* broadly defined, of the public utility or licensee or in the environment in which it operates or expects to operate. The term includes, but is not limited to . . . amounts expended in connection with the proposed development and/or *proposed delivery of substitute* or *synthetic gas supplies* (alternate fuel sources for example, an experimental coal gasification plant or an experimental plant synthetically producing gas from liquid hydrocarbons); . . . . The term includes preliminary investigations and detailed planning of specific projects for securing for customers non-conventional pipeline gas supplies that rely on technology that has not been verified previously to be feasible.

Colorado argues that many of GRI's 1980 projects are beyond this Commission's jurisdiction because they would not produce a manufactured "artificial gas," regulation of which is not within the purview of the Natural Gas Act. This argument, when applied to RD&D expenses, is inapposite. The cases cited by Colorado all deal with raw materials, facilities, or products beyond the Commission's jurisdiction. They do not, as is the case here, deal with surcharges on rates which are clearly jurisdictional for the purpose of RD&D activities which conceivably might lead to applications outside the Commission's jurisdiction. Implementation of these RD&D activities will help insure adequate service to natural gas customers, an activity which is among the Commission's primary obligations in performing its rate-making functions under section 4 of the Act. It has been held that the Commission's "juris-

diction over rates . . . includes authority to determine the reasonableness of costs incurred, even though these [costs themselves relate to matters which] are not subject to . . . direct [Commission] control. . . ." That principle controls here. The Commission's regulations defining RD&D expenses are a proper exercise of this Commission's authority.

* * * * *

The Commission orders:

(A) GRI's application for advance approval of its 1980 R&D program and related 1980-84 five-year R&D plan is hereby granted subject to the terms and conditions of this opinion and order.

(B) A 1980 funding requirement of $55,395,000 is just and reasonable and, effective January 1, 1980 until December 31, 1980, without regard to purchased gas adjustment clause effective dates, jurisdictional members of GRI may collect a general R&D funding unit of 4.8 mills per Mcf, such funding unit to be applied to program funding services of 11,486 Bcf, consisting of sales and transportation deliveries to distributors for resale, to pipelines which are not members of GRI and to ultimate consumers.

(C) A jurisdictional member of GRI may collect the GRI funding unit only if it files, if it has not already done so, an R&D cost adjustment provision which complies with section 154.38(d)(5)(v) of the Commission's Regulations and which contains a provision clearly indicating that the cost adjustment clause is applicable only to payments to GRI, that collections of the GRI funding unit by means of it shall be remitted to GRI within 30 days of receipt, and that such collections shall

be made only from persons receiving program funding services. Such an RD&D cost adjustment provision may be placed into effect upon not less than 30 days notice and it will be allowed to take effect without suspension, reduction or refund.

(D) Stipulation 6 of the September 30, 1977, Stipulation and Agreement approved in Opinion No. 11 shall be amended to read as follows:

* * * * *

Footnotes Omitted

CHAPTER 15B — NATURAL GAS

§ 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected witha public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce of the sale

in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or

sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person

engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

§ 717c. Rates and charges; schedules; suspension of new rates.

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plaintly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such

schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Appendix

81-1425

Office - Supreme Court, U.S.
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SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

In the
Supreme Court of the United States
October Term, 1981

NO. _____

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, GAS RESEARCH INSTITUTE, NORTHERN DISTRIBUTION GROUP, AMERICAN GAS ASSOCIATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED
DECEMBER 31, 1981

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1117

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

GAS RESEARCH INSTITUTE
NORTHERN DISTRIBUTOR GROUP
AMERICAN GAS ASSOCIATION
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
INTERVENORS

Petition for Review of an Order of the Federal Energy Regulatory Commission

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Argued April 2, 1981

Decided August 24, 1981

Eugene C. Cavaliere, Assistant Attorney General State of Colorado for petitioner.

A. Karen Hill, Attorney, Federal Regulatory Commission with whom *Robert R. Nordhaus*, General Counsel and *Jerome Nelson*, Solicitor, Federal Energy Regulatory Commission were on the brief for respondent. *Rhodell G. Fields*, Attorney, Federal Energy Regulatory Commission also entered an appearance for respondent.

Christopher T. Boland with whom *James M. Broadstone* was on the brief for intervenor, Gas Research Institute.

David J. Muchow and *John A. Myler* were on the brief for intervenor, American Gas Association.

Peter H. Schiff, General Counsel, Public Service Commission of the State of New York, *Richard A. Solomon* were on the brief for *Amicus Curiae*. Public Service Commission of the State of New York urging affirmance.

George C. Mastor and *Ned Willis* entered appearances for intervenors, Northern Distributors Group.

Lawrence V. Robertson, Jr. entered an appearance for intervenor Interstate Natural Gas Association of America.

Before: MIKVA and EDWARDS, *Circuit Judges*, and VAN PELT,* *Senior District Judge* for the District of Nebraska.

Opinion for the court filed by *Senior District Judge* VAN PELT.

VAN PELT, *Senior District Judge*: Petitioner seeks review of Opinion No. 64, Docket No. RP79-75 (Oct. 2, 1979) of the Federal Energy Regulatory Commission

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*Sitting by designation pursuant to 28 U.S.C. § 294 (c) (1976).

(referred to herein as FERC or "the Commission"). Opinion No. 64 substantially approved Gas Research Institute's (GRI's) 1980 research and development (R & D) program, and the related 1980-84 five-year R & D plan, and allowed GRI's jurisdictional members to collect a general R & D funding unit of 4.8 mils per Mcf[1] in their rates for sales of natural gas. Petitioner's argument both before the Commission and this court is that FERC had no jurisdiction to approve the program of funding because:

1. GRI is not a natural gas company and does not engage in the transportation or sale of natural gas in interstate commerce, and therefore FERC has no jurisdiction over GRI; and

2. Even if FERC had jurisdiction over GRI, some of the R & D projects planned by GRI fall outside the jurisdiction of FERC and such costs cannot be imposed upon consumers of natural gas.

Before deciding these issues, it may be helpful to review briefly the functions and purpose of both FERC and GRI.

FERC came into being on October 1, 1977 pursuant to the provisions of the Department of Energy Organization Act of August 4, 1977, Pub. L. No. 95-91, 91 Stat. 565 (codified at 42 U.S.C. § 7101 *et seq.*) and Executive Order No. 12009, 42 Fed. Reg. 46267 (Sept. 15, 1977). It assumed the functions and regulatory responsibilities of the Federal Power Commission (FPC) on that date. Under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, FERC has the authority to regulate the

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[1] One Mcf is 1,000 cubic feet. We are informed that, in terms of real economics, the average household consuming 125 Mcf during one year for space heating, cooling and water heating, will be assessed approximately 60 cents for R & D purposes.

interstate transportation and sale of natural gas by natural gas companies. See § 717(b).[2] A natural gas company is defined in § 717(a) as a person or corporation "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

The best brief description of GRI's membership and purpose appears in Opinion No. 64, which states:

> GRI was incorporated on July 8, 1976, under the General Illinois Not for Profit Corporation Act. GRI does not engage directly in research, development and demonstration activities. It is a planning and managing organization which engages in such activities through RD&D project contracts with laboratories, universities and others. As of March 1979, GRI had 190 members—28 interstate pipeline members, 136 distribution company members, 24 municipal utility members, and two associate members.[3]

Prior to GRI's incorporation in 1976, the natural gas industry's research efforts were carried on collectively under the auspices of the American Gas Association

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[2] Section 717(b) limits federal regulation to:

> the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[3] Opinion No. 64, Docket No. RP79-75 at 4-5 (footnotes omitted). GRI's brief to this court indicates that it currently has 29 interstate pipeline companies as members, instead of 28 as stated above. The number is not relevant for the purposes of this opinion, although we will hereafter numerically refer to the group as consisting of 29 members.

(AGA) which is a trade association currently representing some 300 companies involved in the transportation and distribution of natural gas. AGA has filed a brief as an intervenor in this proceeding. Their brief indicates that AGA's first research project was undertaken in 1923 and such research has gradually been expanded through the years until by 1976 AGA had some 90 individual research projects divided into five major areas.[4] The research done by AGA was broad in scope, and this trend has been continued by its successor in interest, GRI.[5]

The first issue for our consideration is whether the Commission has any jurisdiction to approve GRI's research and development program and budget, not just the specific items contained within it. Petitioner contends that the Natural Gas Act does not confer any jurisdiction upon FERC to entertain or rule upon an application filed by a corporation which is not a natural gas company and does not sell or transport gas in interstate commerce. FERC has recognized that GRI is not a natural gas company within the meaning of § 717a(6). In opinion 11, which was an approval of GRI's first request for R & D advance approval in 1977, the Commission specifically stated:

> GRI is not and does not propose to become a "natural gas company" within the meaning of Section

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[4] The five major areas were (1) environmental protection, (2) home climate control and appliances, (3) large-scale commercial, industrial and on-site power uses, (4) supply distribution and storage operations, and (5) basic research.

[5] GRI's five main research areas are (1) supply, (2) economics and systems analysis, (3) environment and safety, (4) efficient utilization, and (5) basic research. Specific projects within these areas will be explored later in this opinion.

> 2(6) of the Natural Gas Act and, as a result, it is not and does not propose to become subject to our continuous jurisdiction.

The Commission went on to find, however, that because GRI was a R & D organization supported by the natural gas industry, it fell within the Commission's regulation of R & D organizations in 18 C.F.R. § 154.38(d) (5) and its initial application fell within Sections 4, 8, 15 and 16 of the Natural Gas Act,[6] and that future annual applications would be submitted under the ratemaking authority granted to the Commission in Section 4 of the Act.

Section 4 of the Act, 15 U.S.C. § 717c, provides that all rates charged by a natural gas company must be "just and reasonable" and that every natural gas company must file schedules showing all rates and charges for any transportation and sale of natural gas. No change in any rates or charges can be made without first filing a copy of the proposed changes with FERC. The Commission then may hold a hearing on the lawfulness of the proposed rate. Under § 717d, the Commission has the authority to determine what constitutes a just and reasonable rate and to fix the same by order.

In this case GRI is proposing an increased assessment among its members of the costs of research and development. The 29 interstate pipeline companies belonging to GRI are natural gas companies subject to FERC's regulation. Before they can raise their rates to incorporate GRI's assessment, they would need commission approval. Instead of requiring each company to submit an application for a rate increase, FERC has enacted 18 C.F.R. § 154.38(d)(5) which allows the R & D organization to

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[6] The corresponding U.S.C. citations for Sections 4, 8, 15 and 16 of the Act are 15 U.S.C. § 717c, g, n and o.

submit the request for Commission approval. 18 C.F.R. § 154.38(d) (5) (ii) states in part:

> Where more than one jurisdictional company proposed to support an RD&D[7] organization as defined below, an approval request may be submitted to the Commission by the RD&D organization covering the organization's RD&D program as defined below. Approval by the Commission of such RD&D program shall constitute approval of individual companies' contributions to the RD&D organization. Organizations eligible to receive contributions from companies and to request program approval from the Commission under this section may be . . . RD&D organizations broadly supported by a single industry sector . . . .

Petitioner made no argument either before the Commission or this court with regard to Commission Rule 154.38 (d) (5),[8] relying instead on the premise that

> if the FERC did not have jurisdiction under the substantive sections of the Natural Gas Act, then

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[7] RD&D stands for research, development and demonstration. Because Gas Research Institute's program contains only the first two areas, the reference is to R & D throughout this opinion.

[8] FERC argues that petitioner's objections here constitute nothing more than a collateral attack on this regulation which was promulgated in 1977 in Order No. 566, Docket No. RM76-171, 13 FPS 5-542 (June 3, 1977). They contend that petitioner should have protested within 60 days of its promulgation, as provided for in the Natural Gas Act. We find no merit in this contention. There has been a timely petition for review of Opinion 64, applying the earlier order, which is entirely proper. *See Geller v. FERC*, 610 F.2d 973 (D.C. Cir. 1979); *Alabama Ass'n of Insurance Agents v. Board of Governors of Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978); *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

> Section 154.38 (d) (5) (i) through (v) cannot confer this jurisdiction.

Petitioner's brief at 26. Its sole argument is based on the fact GRI is not a natural gas company. We find such argument to be unduly restrictive and to exalt form over substance.

FERC does not seek to regulate that over which it has no statutory authority, but seeks to simplify the application procedures for those companies over which it does have jurisdiction. Instead of requiring each of the 29 interstate pipeline companies to apply for approval of R & D costs, FERC allows the R & D organization, which actually incurs the costs and plans the programs and budget, to submit a single application on their behalf. This seems to be the rare instance of a government agency trying to cut red tape, about which we all too often hear, only to be penalized for trying to streamline procedures.

It has been held on numerous occasions that the Federal Power Commission (FERC's predecessor) could exercise its ratemaking authority in a generic fashion as opposed to on a case-by-case basis. One of the issues in *Permian Basin Area Rate Cases*, 390 U.S. 747, 768 (1968), was whether

> the Commission may, consistently with the Constitution and the Natural Gas Act, regulate producers' interstate sales by the prescription of maximum area rates, rather than by proceedings conducted on an individual producer basis.

The Supreme Court found that area regulation under the circumstances was permissible. The Court took note of the need for administrative ease with regard to the Commission's regulation of rates, stating:

> The Commission has asserted, and the history of producer regulation has confirmed, that the ultimate

> achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious administrative methods. The Commission believes that the elements of such methods may be found in area proceedings. "[C]onsiderations of feasibility and practicality are certainly germane" to the issues before us. *Bowles v. Willingham*, [321 U.S. 503], 517 [1944]. We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.

Id. at 77. *See also Shell Oil Company v. Federal Power Commission*, 520 F.2d 1061 (5th Cir. 1975) which approved the FPC's promulgating a new rate order through rulemaking procedures and further sustained a new national rate for wellhead sales of natural gas, replacing the area rates earlier approved in *Permian Basin, supra*. In light of the above we find that the Commission had the authority to accept and rule on an application for a rate increase submitted by GRI on behalf of its jurisdictional members, and was not required to process applications on an individual basis.

The second issue raised by petitioner is that FERC approved GRI's expenditure of funds in 26 areas[9] of re-

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[9] The 26 areas are as follows:

Thermochemical Hydrogen
Nonfossil Sources
Improved Utilization Technology Assessment
Control Technology Development
Gas-Fired Heat Pumps
Improved Gas Furnaces
Improved Gas Appliances
Advanced Appliance Technology
Integrated Appliances
Phosphoric Acid Systems
Advanced Fuel Cell Concepts

[Continued]

search which are outside the authority of GRI. Petitioner does not challenge on jurisdictional grounds any of the R & D project areas which have as their goal the production, transportation or sale of natural gas in interstate commerce. However, it claims the 26 areas, listed in footnote 9 herein,

> are *clearly* not within the purview of the Natural Gas Act or the jurisdiction of the FERC, and therefore not within the jurisdiction of the FERC to include as research and development projects, the cost of which is to be charged by interstate pipeline companies to their customers, which ultimately is paid by the ultimate consumer . . . .

Docket No. RP79-75, Comments of the Public Utilities Commission of the State of Colorado Regarding the Application of Gas Research Institute at 7, Joint Appendix at 404. Those 26 areas, while not relating to the production, transportation, or sale of natural gas in interstate commerce, all have as their broad goal the conservation of dwindling gas supplies. This is to be accomplished in a variety of ways. Several research areas are geared toward helping the consumer household reduce its consumption of gas. Examples of this are gas-fired heat

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[9][Continued]
Field Test Activities
Heat Pump Developments
Energy Recovery Systems
Burner System Development
Process Efficiency Improvements
Residential/Commercial Applications
Industrial Solar-Augmented Systems
Solar Energy System Components
Kinetics and Catalysis
Thermodynamics [Synthetic Fuels portion]
Molecular Structure, Properties and Processes
Materials
Measurements and Instrumentation
Mass and Heat Transfer
University Grants.

pumps, improved gas furnaces, improved gas appliances, and integrated appliances (i.e., using waste heat from gas range to preheat hot water, integrated furnace/water heater, etc.). Some areas of research are geared toward conservation of energy in the commercial sector, such as recovering low-grade excess heat from industrial processes, development of highly efficient, cost effective, generic classes of industrial heat recovery systems, and developing more efficient, less polluting multi-fuel industrial burner systems for direct and indirect combustion applications. Research is also proposed and budgeted to explore solar-augmented heating and cooling systems and water heaters, and solar-assisted appliances and gas heat pumps. Going beyond mere solar assisting of gas, is research into solar energy system components (such as storage development), research into thermochemical processes for large-scale production of hydrogen, the feasibility of using renewable energy sources to produce gaseous fuels, gas-fired, fuel cell electric power plants, fuel cell energy systems, and basic research into areas such as thermodynamics and molecular structure which would relate to synthetic fuels. In addition, there are seven other areas[10] to which petitioner objects relating to the production of artificial gas from sources such as coal, oil shale, land-based or water-based biomass. Petitioner argues that the Natural Gas Act gives FERC no jurisdiction over development and manufacture of improved gas appliances, furnaces, water heaters, electric power plants, solar energy, or synthetic fuels, and that these

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[10] Those seven areas are:

Gasification Process
Associated SNG Technology
In-SITU Coal Gasification
Land-Based Crops
Water-Based Crops
Energy Conversion
Assessment and Field Studies.

items are not intended to be and never will be purchased by a natural gas company and used in its jurisdictional business.

We find that the Supreme Court on numerous occasions has held that FERC, and its predecessor FPC, may take into consideration nonjurisdictional items when setting jurisdictional rates. In *FERC v. Pennzoil Producing Co.*, 439 U.S. 508 (1979) the Supreme Court held that the Natural Gas Act did not deny FERC the authority to give special rate relief to individual producers where escalating royalty costs were a function of, or were otherwise based upon, an unregulated market price for the product whose sale in the interstate market is regulated by the Commission. In *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635 (1945), the Supreme Court held that although the Commission lacked the authority to fix rates for direct industrial sales, it could take those rates into consideration when fixing the rates for interstate wholesale sales which were subject to its jurisdiction. Similarly, in *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945), the Supreme Court held that while § 1(b) of the Natural Gas Act precludes the Commission from any control over the activity of producing or gathering natural gas,

> it does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction.

Id. at 603. *See also Federal Power Commission v. United Gas Pipe Line Co.*, 386 U.S. 237 (1967) (FPC has the power to reduce rates based on the application of nonjurisdictional losses to jurisdictional income when it resulted in tax savings to the jurisdictional company).

Thus, allowing a rate adjustment for some factor over which FERC does not have jurisdiction does not automatically mean the rate is unjust and unreasonable.

Petitioner has not cited any other case, controlling or otherwise, dealing specifically with research and development expenses under the Commission's ratemaking authority. It does claim a recent case in this Circuit, *Office of Consumers' Counsel v. Federal Energy Regulatory Commission,* No. 80-1303 (D.C. Cir. filed Dec. 18, 1980) dealing with a demonstration project under the Commission's licensing authority is dispositive of this case. *Office of Consumers' Counsel,* hereinafter referred to as the *Great Plains* case, involved FERC's granting a certificate of public convenience and necessity to Great Plains Gasification Associates, composed of five affiliates of natural gas companies, to build a coal gasification plant. Although *Great Plains* and this case each deal, to some extent, with synthetic fuels, we believe the two cases should be distinguished.

In order to understand the differences, it will be necessary to examine the *Great Plains* case in some detail. The initial proposal was to build a commercial coal gasification plant at a cost of over one billion dollars which would produce 250,000 Mcf of synthetic gas. This was later scaled down to 125,000 Mcf. Unable to obtain federal loan guarantees, the project was revamped. Consumer ratepayers would shoulder the burden of critical financing costs, including guaranteeing the debt investment in the project under all circumstances. It was presented as a demonstration project to test the technical, environmental and economic viability of a coal gasification plant, and not designed as a project to supply gas.

A panel of this court found that the grant of the certificate was an attempt by FERC both to regulate and finance a synthetic fuel plant when the Natural Gas Act and case law such as *Henry v. FPC,* 513 F.2d 395

(D.C. Cir. 1975), made it clear that FERC had no jurisdiction over synthetic fuel unless and until it was mixed with natural gas in interstate commerce. The panel found that the plant has "at best a tenuous relationship to any future jurisdictional sale or shipment of gas"[11] and that the financing arrangements "were certainly not ordered with the interests of ratepayers foremost in mind."[12] In finding that the Commission had exceeded its authority, the Court stated:

> Our own review . . . of the purposes reasonably attributable to Congress in authorizing FERC's certifications and rate setting powers reveals that it did not intend to vest FERC with those powers for the purpose of regulating and arranging financing for facilities, like Great Plains, devoted exclusively to manufacturing synthetic gas. We therefore hold that Opinion 69 exceeded the Commission's statutory authority because it attempted to create a rate-payer-based financing package for the construction of a commercial-size coal gasification plant despite the fact that its rate setting and certificating powers were not granted to it for that purpose; and because it purported to regulate the construction and operation of such plant despite the fact that FERC has no regulatory jurisdiction over any aspect of synthetic gas development prior to its commingling with natural gas.

Office of Consumers' Counsel, supra, slip opinion at 30-31.

Finally, even though this court found that the Commission did not have the authority to issue a certificate of public convenience and necessity pursuant to § 7 of the Natural Gas Act, 15 U.S.C. § 717f, it stated:

> Nothing in this holding denies FERC any authority it may have to consider the costs of production

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[11] *Office of Consumers' Counsel, supra,* slip opinion at 22.

[12] *Office of Consumers' Counsel, supra,* slip opinion at 38.

of synthetic gas in the course of considering jurisdictional sales rate filings and petitions under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, or to give advance notification that it will do so pursuant to its Order No. 566.

The differences between the *Great Plains* case and this one are readily apparent. Unlike *Great Plains,* and the *Henry* case before it, 513 F.2d 395 (D.C. Cir. 1975), GRI does not here request from FERC certifications under Section 7 for its projects. On the contrary, only ratesetting for jurisdictional companies acknowledgedly within Section 4 jurisdiction is at issue here, and FERC's discretion and authority under the two sections are not necessarily coextensive. In this case FERC is not seeking to regulate the construction or operation of any project; in fact, GRI's research and development program does not include a single commercial demonstration project. Unlike *Great Plains,* also, where two FERC staff people were assigned full-time to Great Plains home office to oversee construction of the plant, GRI's research will be carried on without extensive supervision. GRI is not putting all of its eggs in one basket by devoting all of its resources to one risky venture, or to synthetic fuel (let alone one particular type of synthetic fuel), or to solar energy, etc. It has steered a course of moderation which includes areas of natural gas research, synthetic gas, gas efficiency, etc. If GRI's research results in gas saving appliances, or water heaters, or the ability to use solar-assisted applicances which would result in gas savings, it is clear that rate paying customers would be benefited. Conservation is definitely a means of enhancing natural gas supplies and keeping consumer rates down.[13] We do not

[13] We earlier made reference in note 8, *supra,* to FERC's order No. 566, which permits the costs of various RD&D projects to be included in the rates of jurisdictional com-

understand petitioner to have challenged such projects as not having any chance of success, or of not providing such potential benefit to consumers.

To limit research projects to the production or transportation of natural gas would not only be unduly re-

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panies. *Office of Consumers Counsel, supra,* slip op. at n.32. There we said that the Order

> provides valid guidance in specifying under what circumstances advance assurance of rate treatment should be provided for RD&D projects brought before the Commission in Section 4 proceedings. Further, we recognize that despite the Commission's general practice of charging gas customers only for the costs of providing current service and deferring costs of investment for future service until the service begins, . . . there may be situations where the Commission will have discretion to permit not only advance *assurance* of rate treatment, but also the charging to current ratepayers of expenditures incurred by a jurisdictional company on its RD&D experiment even before the experiment bears fruit, so long as FERC's jurisdiction to include the costs of the experiment does not depend solely on the contingency that the experiment bears fruit and contributes to the flow of mixed gas, as is the case with the Great Plains project. For example, expenditures for a RD&D project directly concerning the transportation, transfer, or storage of natural or commingled gas, or related to increasing the supply of unmixed natural gas, might in appropriate circumstances be recoverable from current ratepayers, since such a project would be jurisdictional from its very inception. [Citations omitted.]

As we have noted, *supra* at p. 10, all 26 R & D project areas in this case have as their broad goal the conservation of gas supplies, and we deem this to be within FERC's Section 4 authority to promote, since it results in increasing the supply of natural gas available to the nation's natural gas consumers. Taken as a whole, GRI's R & D program constitutes one of those situations where FERC may permit "the charging to current ratepayers of expenditures incurred by a jurisdictional company on [an] RD&D experiment even before the experiment bears fruit." *Office of Consumers' Counsel, supra,* slip op. at n.32.

strictive, but would ignore the reality that natural gas supplies are being exhausted and are not renewable. In order to make natural gas available in the future, some sort of conservation must be exercised and the best alternatives studied and selected. The Supreme Court has stated that "[t]he fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices." *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978). Limiting research by GRI solely to areas of natural gas production would appear insufficient in assuring such an adequate and reliable supply at reasonable prices. Finally, there is Supreme Court precedent[14] under Section 4 of the Act that FERC may take into account non-jurisdictional activities when setting just and reasonable rates.

This panel, which includes one member who was on the *Great Plains* panel, has concluded *Great Plains* is not controlling under the facts of the case. In summary, we believe there is a difference between FERC's becoming an active participant in the building, financing and operation of a large scale commercial synthetic fuel operation which had little possibility of benefit to the ratepayer, and the various areas of research to be carried out here.

The Commission's order is affirmed.

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[14] *FERC v. Pennzoil Producing Co., supra; Panhandle Eastern Pipeline Co. v. Federal Power Commission, supra; Colorado Interstate Gas Co. v. Federal Power Commission, supra.*

Opposition

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Supreme Court, U.S.
FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1425

In the Supreme Court of the United States

OCTOBER TERM, 1981

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly determined that the interstate pipeline companies it regulates may recover in their rates the amounts they contribute to the Gas Research Institute's research and development programs aimed at maintaining natural gas supplies.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1425

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. 1-17) is reported at 660 F. 2d 821. The opinion of the Federal Energy Regulatory Commission (Pet. App. 13-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1981. A petition for rehearing was denied on October 6, 1981. The petition for a writ of certiorari was filed on December 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 1, 2 and 4 of the Natural Gas Act, 15 U.S.C. 717, 717a and 717c, are set forth at Pet. App. 19-2[illegible].

STATEMENT

1. The Gas Research Institute ("GRI") is a non-profit corporation organized and supported by 190 regulated natural gas companies. Its function is to plan and manage comprehensive research and development activities aimed at maintaining the availability of gas as an energy source in this country. GRI's operations are conducted within a framework of five program areas: (1) increasing gas supplies; (2) increasing the efficiency of gas-using equipment; (3) enhancing the safety and reliability of gas service; (4) increasing information about gaseous fuel and technology; and (5) analyzing the information it develops for most effective application (R. 688-689).[1]

GRI's members include 29 interstate gas pipeline companies, whose rates for the transmission and sale for resale of natural gas are regulated by the Commission under the Natural Gas Act, 15 U.S.C. 717 *et seq.* As with all their costs of doing business, these regulated pipelines are required to seek the Commission's approval to recover in their rates their contributions to GRI's budget. Where, as here, research and development efforts by pipelines are undertaken cooperatively by a number of gas companies through a single research, development and demonstration ("RD&D") organization, the Commission's rate schedule regulations provide for a generic determination regarding the reasonableness of the pipelines' contributions to the RD&D organization.[2] This generic determination is accomplished

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[1]"R." refers to the record in the court of appeals.

[2]RD&D organizations are defined in the Commission's regulations as "organizations broadly supported by a number of energy industry sectors (*e.g.*, natural gas, electric power, petroleum, coal, nuclear energy); RD&D organizations broadly supported by a single industry sector; regional organizations that work primarily on problems of a regional nature; or consortia of companies that jointly support RD&D programs for the collective benefit of their ratepayers." 18 C.F.R. 154.38(d)(5)(ii).

through review of the organization's program: "[a]pproval by the Commission of such RD&D program shall constitute approval of individual companies' contributions to the RD&D organization." 18 C.F.R. 154.38(d)(5)(ii).

The Commission has determined that GRI is a legitimate RD&D organization as defined in the Commission's regulations and has approved the pipelines' contributions to GRI's program for each year since the first application for approval was granted in 1978. This case presents the only challenge to these Commission decisions.

2. In the present proceeding, Colorado filed comments with the Commission arguing: (1) that the Commission lacked jurisdiction to rule on the reasonableness of GRI's budget and program because GRI is not itself a natural gas company; and (2) that the Commission could not permit the pipelines' rates to reflect expenditures for nonjurisdictional research (Pet. App. 14-15).

The Commission rejected these claims, concluding that it has jurisdiction under Section 4 of the Natural Gas Act, 15 U.S.C. 717c, to regulate the rates of GRI's pipeline members, and that its Section 4 power includes the authority to determine the reasonableness of costs incurred by the pipelines in connection with their jurisdictional business (Pet. App. 15-17).[3]

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[3]Section 4 of the Act provides in pertinent part:

> (a) All rates and charges made * * * by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission * * * shall be just and reasonable * * *.
>
> * * * * * *
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any trans-

The court of appeals affirmed (Pet. Supp. App. 1-17). With respect to petitioner's jurisdictional argument, the court explained (*id.* at 8):

> FERC does not seek to regulate that over which it has no statutory authority, but seeks to simplify the application procedures for those companies over which it does have jurisdiction. Instead of requiring each of the 29 interstate pipeline companies to apply for approval of R&D costs, FERC allows the R&D organization, which actually incurs the costs and plans the programs and budget, to submit a single application on their behalf.

The court also rejected petitioner's contention that the Commission lacked statutory authority to approve expenditures for nonjurisdictional activities, noting that this Court had held in several cases that the Commission "may take into consideration nonjurisdictional items when setting jurisdictional rates" (Pet. Supp. App. 12). The court reasoned (*id.* at 16-17) that

> [t]o limit research projects to the production or transportation of natural gas would not only be unduly restrictive, but would ignore the reality that natural gas supplies are being exhausted and are not renewable. In order to make natural gas available in the future, some sort of conservation must be exercised and the best alternatives studied and selected. The Supreme Court

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portation or sale subject to the jurisdiction of the Commission * * *.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate * * * except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission * * * new schedules stating plainly the change or changes to be made in the schedule * * *.

has stated that "[t]he fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices." *California* v. *Southland Royalty Co.*, 436 U.S. 519, 523 (1978). Limiting research by GRI solely to areas of natural gas production would appear insufficient in assuring such an adequate and reliable supply at reasonable prices.

ARGUMENT

The decision of the court of appeals correctly applied settled legal principles in affirming the Commission's determination that the interstate pipeline members of GRI may recover in their rates their contributions to GRI's research efforts. The decision below does not conflict with decisions of this Court or any other court. In these circumstances, further review is not warranted.

1. Section 4 of the Natural Gas Act provides that the Commission must approve any change in rates charged by jurisdictional natural gas companies. Accordingly, when GRI sought an increased assessment, the pipelines had to obtain the Commission's approval before they could raise their rates in order to incorporate in their rates this increased cost of doing business. Rather than requiring each pipeline company in this situation to apply individually for a rate increase, however, the Commission adopted 18 C.F.R. 154.38(d)(5), which allows a RD&D organization to submit one request for Commission approval.

Petitioner objects to this procedure on the ground that GRI is not itself a natural gas company. The court of appeals properly concluded that this argument was "unduly restrictive and * * * exalt[ed] form over substance" (Pet. Supp. App. 8). As the court observed (*ibid.*), "[i]t has been held on numerous occasions that the * * * Commission * * * could exercise its ratemaking authority in a generic fashion as opposed to on a case-by-case basis." See *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-779 (1968);

Shell Oil Co. v. *FPC*, 520 F. 2d 1061, 1073-1074 (5th Cir. 1975). Accordingly, the court held that "the Commission had the authority to accept and rule on an application for a rate increase submitted by GRI on behalf of its jurisdictional members, and was not required to process applications on an individual basis" (Pet. Supp. App. 9).

Petitioner attempts to draw a distinction between generic ratemaking for producers and generic ratemaking for pipelines (Pet. 7-8). But this is a distinction without a difference, because in either situation the question is whether the Commission has authority to give generic consideration to an element of rates. Indeed, the Commission previously has given generic approval to recovery of certain types of costs in pipelines' rates. Thus, in 1971, the Commission promulgated a rule permitting pipelines to include in their rate-bases amounts they advanced to producers for exploration and development of natural gas. Order Nos. 410 and 410-A, Docket No. R-380 (Oct. 2, 1970 and Jan. 8, 1971), aff'd, *Public Service Commission of New York* v. *FPC*, 467 F. 2d 361 (D.C. Cir. 1972).[4] Similarly, in Order No. 452, Docket No. R-406 (Apr. 14, 1972), codified at 18 C.F.R. 154.38(d)(4), the Commission issued a rule that permits pipelines automatically to recover increased costs for purchased gas supplies. Under the regulation at issue here, as under the above regulations, each pipeline must file individual rate changes with the Commission, which then reviews the amounts for compliance with the Commission's generic order.

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[4]Even though the Commission ultimately was overturned in its implementation of the "advanced payment program" (see, *e.g.*, *Tennessee Gas Pipeline Co.* v. *FERC*, 606 F. 2d 1094 (D.C. Cir. 1979)), its authority generically to approve recovery of such expenditures was repeatedly upheld. See, *e.g.*, *Public Service Commission of New York* v. *FPC*, 511 F. 2d 338 (D.C. Cir. 1975).

2. Petitioner also contends (Pet. 10) that the Commission may not "include, in jurisdictional rates, costs that will never become part of the costs of a natural gas company in its jurisdictional business." However, the court of appeals correctly found that the expenditures at issue here *are* costs reasonably incurred in providing jurisdictional service because they are incurred " 'to assure an adequate and reliable supply of gas at reasonable prices' " (Pet. Supp. App. 17, quoting *California* v. *Southland Royalty Co.*, 436 U.S. 519, 523 (1978)). For many years prior to GRI's incorporation in 1976, research into methods of maintaining natural gas supplies and into other areas broadly relating to distribution and consumption of natural gas had been conducted under the auspices of the American Gas Association and had been supported by contributions recovered in jurisdictional rates (see Pet. Supp. App. 4-5 & n.4).

At bottom, Colorado's dispute is with the Commission's judgment, which was affirmed by the court below, that the pipelines' expenditures in support of GRI's research and development program are reasonably related to the conduct of the pipelines' jurisdictional business, even though some of the fruits of those expenditures (*e.g.*, the production of more efficient gas-powered appliances) will never be "provided to a natural gas company for use in its jurisdictional business" (Pet. 11). But as the court of appeals accurately observed in rejecting this contention, "[l]imiting research by GRI solely to areas of natural gas production would appear insufficient in assuring * * * an adequate and reliable supply [of gas] at reasonable prices" (Pet. Supp. App. 17).[5]

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[5]Petitioner further contends (Pet. 11-12) that the decision below is inconsistent with the decision of a different panel of the District of Columbia Circuit in *Office of Consumers' Counsel* v. *FERC*, 655 F. 2d 1132 (D.C. Cir. 1980). This claim of an intracircuit conflict is without merit for the reasons stated by the court of appeals (Pet. Supp. App. 13-17) and, in any event, does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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A. KAREN HILL
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APRIL 1982

Intervenor's Opposition

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Supreme Court, U.S.
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No. 81-1425

IN THE
Supreme Court of the United States

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PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF INTERVENOR GAS RESEARCH INSTITUTE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC), pursuant to its authority under the Natural Gas Act (NGA), may approve, on a generic, rather than individual, basis, interstate natural gas pipeline rate adjustments proposed by a research and development planning and management organization on behalf of, and as agent for, its interstate natural gas pipeline members.

2. Whether the FERC, pursuant to its authority under the NGA, may approve rate adjustments based upon the costs of research and development (R&D) activities that serve the NGA's fundamental purpose of assuring an adequate supply of natural gas at reasonable prices through exploring new means of enhancing supply and increasing the efficiency and economy of gas usage.

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BRIEF OF INTERVENOR GAS RESEARCH INSTITUTE IN OPPOSITION

STATEMENT OF THE CASE

Under the Natural Gas Act (NGA), 15 U.S.C. § 717 *et seq.*, the Federal Energy Regulatory Commission (referred to hereinafter as FERC or the Commission) has the authority to regulate the interstate transportation and sale for resale of natural gas by natural gas companies. The term "natural gas company" is defined in Section 2(6) of the NGA, 15 U.S.C. § 717a(6), as a person or corporation "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."[1]

Section 4 of the NGA, 15 U.S.C. § 717c, provides that all rates charged by a natural gas company must be "just and reasonable," and that every natural gas company must file

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[1] Pet. App. at 20.

schedules showing all rates and charges for any transportation and sale for resale of natural gas. No change in any rates or charges can be made without the approval of FERC.

The Commission has provided in its regulations for procedures whereby expenditures for research, development, and demonstration (RD&D) proposed to be permitted in the rates of natural gas companies may be determined on a generic basis. These regulations provide that an RD&D organization supported by members of an industry sector subject to the FERC's ratemaking jurisdiction (*e.g.*, interstate natural gas pipeline companies) may propose an increased assessment among those members of the costs of RD&D carried out on their behalf. Section 154.38(d)(5)(ii) of the regulations, 18 C.F.R. § 154.38(d)(5)(ii) (1981), provides, in pertinent part, as follows:

> Where more than one jurisdictional company proposes to support an RD&D organization as defined below, an approval request may be submitted to the Commission by the RD&D organization covering the organization's RD&D program as defined below. Approval by the Commission of such RD&D program shall constitute approval of individual companies' contributions to the RD&D organization. Organizations eligible to receive contributions from companies and to request program approval from the Commission under this section may be . . . RD&D organizations broadly supported by a single industry sector. . . .

Thus, instead of requiring each individual company to file a separate application for a rate increase, the FERC allows the RD&D organization to submit a single application *as agent* for those companies.

Gas Research Institute (GRI) is a research and development (R&D) planning and managing organization incorporated on July 8, 1976, under the General Illinois Not for Profit Corpora-

tion Act. GRI was organized to carry out cooperative R&D activities designed to address the scientific and technical problems mutually confronting its gas transmission and distribution company membership and the consumers served thereby.[2] GRI's R&D program is structured to address these problems comprehensively without unduly duplicating the efforts of individual gas service companies, other research and development organizations and government agencies. Among GRI's members are 29 interstate natural gas pipeline companies — "natural gas companies" within the meaning of Section 2(6) of the NGA, *supra*.

In its Opinion No. 11,[3] the FERC found that GRI is an "RD&D organization" within the meaning of the regulations, and, as such, is entitled to seek approval under Section 4 of the NGA of expenditures for RD&D carried out on behalf of its interstate natural gas pipeline company members.

On June 4, 1979, GRI filed its third annual application with the FERC under the aforesaid regulations. During the pendency of this application, the Public Utilities Commission of the State of Colorado (hereinafter referred to as Colorado or Petitioner) filed comments opposing approval of GRI's program. Colorado argued that the Commission has no jurisdiction to consider GRI's program because GRI is not a "natural gas company"

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[2] Prior to GRI's incorporation in 1976, the natural gas industry's cooperative research efforts were carried on collectively under the auspices of the American Gas Association (A.G.A.), which is a trade association currently representing some 300 companies involved in the transportation and distribution of natural gas. A.G.A.'s first research project was undertaken in 1923, and such research was gradually expanded through the years until, by 1976, A.G.A. had some 90 individual research projects divided into five major areas. The research done by A.G.A. was broad in scope, and this trend has been continued by its successor in interest, GRI.

[3] Opinion No. 11, *Gas Research Institute*, Docket No. RM77-14, 14 F.P.S. 5-479 (March 22, 1978), *reh. den.*, Opinion No. 11-A, 14 F.P.S. 5-983 (May 22, 1978).

subject to the Commission's jurisdiction under the NGA. Colorado also claimed that, even if the Commission might allow the pipelines to pass through some of GRI's expenditures, it has no power to allow recovery from ratepayers of expenditures devoted to developing technologies that are not within the jurisdiction of the FERC. Colorado, therefore, requested the Commission to dismiss GRI's application or, alternatively, to disapprove funding for any project outside the Commission's jurisdiction.

On October 2, 1979, the FERC issued its Opinion No. 64,[4] in which it substantially approved GRI's 1980-1984 five-year R&D plan, and allowed GRI's jurisdictional members to collect a general R&D funding unit of 4.8 mills per Mcf[5] in their rates for transportation and sales for resale of natural gas in order to fund R&D activities specified in the first year of the plan.

In Opinion No. 64, the Commission rejected Colorado's arguments, pointing out that approval of GRI's program under the Commission's regulations is simply a generic approval of its member pipelines' research and development expenditures under Section 4 of the Natural Gas Act.

Further, the Commission noted that its power to permit rate recovery of expenditures for activities that the Commission may not regulate is inherent in its rate-making authority. The Commission explained:

> Implementation of these RD&D activities will help insure adequate service to natural gas customers, an activity which is among the Commission's primary obligations in performing its ratemaking functions under Section 4 of the

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[4] Pet. App. at 13.

[5] One Mcf is 1,000 cubic feet. Thus, the average household consuming 125 Mcf during one year for space heating, cooling and water heating, will be assessed approximately 60 cents to defray the costs of the R&D activities approved in Opinion No. 64.

> Act. It has been held that the Commission's "jurisdiction over rates . . . includes authority to determine the reasonableness of costs incurred, even though these [costs themselves relate to matters which] are not subject to . . . direct [Commission] control. . . ." That principle controls here.
>
> *Id.*, Pet. App. at 16-17.

The Commission recited its regulatory definition of recoverable research, development and demonstration costs: those costs which are "reasonably related to the existing or future utility business, broadly defined, of the public utility or licensee or in the environment in which it operates. . . ." 18 C.F.R. Part 201, Definition 28B. The Commission found the pipelines' contributions to GRI to be consistent with this definition because the expenditures are for research and development of technologies that will help ensure adequate service to natural gas customers.

Colorado's application for rehearing of Opinion No. 64 was denied by operation of law when the Commission chose not to act on it. 15 U.S.C. § 717r(a) and 18 C.F.R. § 1.34(c).

On petition for review, the court of appeals affirmed in all respects (Pet. Supp. App. 1-17). As to Colorado's contention that the FERC erred in acting upon applications submitted by GRI because it is not a natural gas company, the court held that the FERC has the authority to accept and rule on an application for a rate increase submitted by GRI on behalf of its jurisdictional members, and is not required to process applications of such members on an individual basis.

As to Colorado's remaining contention that the FERC erred in approving expenditures in 26 areas of R&D that it contends are outside the Commission's NGA jurisdiction, the lower court held that Colorado's position was unduly restrictive and inconsistent with the NGA's fundamental purpose of assuring an adequate and reliable supply of gas at reasonable prices.

Colorado filed a petition for rehearing with the court of appeals on September 14, 1981, which was denied *per curiam* on October 6, 1981.

SUMMARY OF ARGUMENT

I

Petitioner contends that the effect of the FERC's Opinion No. 64 is not to regulate rates of interstate pipeline companies subject to its jurisdiction under the NGA, but rather to regulate GRI, an RD&D organization that is outside of the Commission's jurisdiction. The court of appeals determined that the effect of the FERC's opinion is to adjust pipeline rates for changes in R&D costs and not to regulate RD&D organizations such as GRI. The court went on to emphasize that exactly the same result could have been achieved through 29 repetitions of more commonly used pipline rate adjustment procedures. The court's holding that Colorado's view was unduly restrictive and exalted form over substance is clearly well-founded.

Petitioner cites no authority for its additional contention that pipeline rate regulation pursuant to Section 4 of the NGA must be on an individual company, as opposed to a group or generic, basis. In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court held that the FERC is free to adopt whatever procedures it finds most conducive to administering its rate regulation duties under the NGA, so long as such procedures comport with relevant Constitutional and statutory constraints. *Permian* also holds that neither the Constitution nor the NGA precludes the FERC from utilizing group or generic means of producer rate regulation. Since the statutory and administrative considerations involved in this case are identical to those involved in *Permian*, and no Constitutional issues are involved in this case, it is clear that the FERC is free to adopt a generic approach to pipeline rate regulation as it has in this case. Nevertheless, Petitioner maintains that the FERC has never used generic

means of *pipeline* rate regulation. The fact is, however, that the FERC has utilized a generic approach to pipeline rate regulation on several occasions and that, on one such occasion, this Court specifically affirmed the FERC's authority to do so. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 299, 330 (1974).

Petitioner also maintains that the court of appeals erred in rejecting its argument that the FERC exceeded its jurisdiction in approving rate increases for GRI's 29 interstate pipeline members to the extent that such increases were based upon R&D costs associated with efforts to supplement natural gas supplies and to increase the efficiency of gas use. The court of appeals held that the FERC is free to take nonjurisdictional matters into account in regulating pipeline rates, citing *FERC* v. *Pennzoil Production Co.*, 439 U.S. 508 (1979), *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945), and *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945), and that the Commission's action in this case is consistent with the primary purpose of the NGA and, therefore, legitimate.

Petitioner argues, in effect, that the first two of these Opinions are irrelevant to this case. According to Petitioner, the nonjurisdictional costs involved in *Pennzoil* and *Colorado Interstate* were appropriately considered to be costs of rendering jurisdictional service, whereas the R&D costs involved in this case were not. However, in view of the uncontested potential of these R&D costs to benefit gas consumers and to serve the NGA's fundamental purpose of assuring an adequate supply of gas at reasonable prices, the court of appeals affirmed the FERC's determination that they are costs of conducting interstate natural gas pipeline service and, as such, may be recovered in jurisdictional rates. In this sense, the court of appeals found these R&D costs to be similar to the nonjurisdictional royalty costs involved in *Pennzoil* and the nonjurisdictional production costs involved in *Colorado Interstate*.

Similarly, Petitioner's discussion of *Panhandle* makes clear its unwillingness to defer to the FERC's expertise and discretion the determination of whether particular R&D expenditures relate directly enough to FERC jurisdictional services to warrant their recoupment through rates and charges for such services. Petitioner maintains that the lower court's citation of *Panhandle*, as yet another example of the FERC's freedom to take nonjurisdictional items into consideration in regulating rates, is irrelevant to this case. To the contrary, this Court's affirmance in *Panhandle* of the Commission's taking clearly nonjurisdictional profits into account in setting jurisdictional rates illustrates the Commission's broad discretion to consider matters outside its jurisdiction in regulating jurisdictional rates pursuant to the NGA.

Clearly, nothing in the court of appeals' use of this Court's Opinions relating to the scope of the FERC's rate regulation authority, under Section 4 of the NGA, constitutes sufficient cause for granting the petition.

II

In the second stated ground for granting its petition, Colorado maintains that the court of appeals erred in deciding this case inconsistently with a similar case decided by that court on the same issue: *Office of Consumers' Counsel* v. *FERC*, 655 F.2d 1132 (1980). Colorado is simply mistaken in its characterization of the two cases.

The fact is that Colorado was unsuccessful in convincing the court of appeals either that the cases were significantly similar or that the same issue was involved. In fact, aided by a Judge who sat on both cases,, the court of appeals found that this case fits well within the rationale stated in its previous and allegedly inconsistent opinion. Petitioner's failure to accept the court of appeals' interpretation of its own opinion does not constitute sufficient cause to grant the petition.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S PREVIOUS OPINIONS RELATING TO THE FERC'S RATE REGULATION

A. The Court Of Appeals' Affirmance Is Consistent With Both *Permian* And *Mobil*.

While Petitioner has taken language out of context in an effort to demonstrate that the court of appeals erred in failing to recognize the FERC's Opinion No. 64 as an attempt to regulate GRI itself, both the FERC's opinion and its regulations strongly support the court of appeals' holding that GRI's role in this case is one of *agent* for its FERC jurisdictional members, and that the result of the FERC's action is the rate regulation of such members, *not* of GRI itself.

In response to Colorado's argument that the FERC is without jurisdiction to entertain, and act upon, GRI's application because GRI is not a natural gas company over which FERC has jurisdiction, the FERC, in Opinion No. 64, described the genesis of the procedure utilized in this case:

> Colorado's arguments against our jurisdiction ignore the history of Commission action in authorizing and encouraging cooperative industry-wide research and development activities in the natural gas industry. In order No. 566, the Commission amended its regulations to allow advance approval of the research and development programs of organizations deriving financial support from jurisdictional companies. Order No. 566 added a new section 154.38(d)(5)(ii) which described this procedure and specifically stated that "[*a*]*pproval by the Commission of such RD&D program shall constitute approval of individual companies' contributions to the RD&D organizations.*" [Emphasis supplied.]
>
> Pet. App. at 15.

In dealing with this same contention, the court of appeals summed up its disagreement with Petitioner's argument as follows:

> FERC does not seek to regulate that over which it has no statutory authority, but seeks to simplify the application procedures for those companies over which it does have jurisdiction. *Instead of requiring each of the 29 interstate pipeline companies to apply for approval of R&D costs, FERC allows the R&D organization which actually incurs the costs and plans the programs and budget, to submit a single application on their behalf.* This seems to be the rare instance of a government agency trying to cut red tape, about which we all too often hear, only to be penalized for trying to streamline procedures. [Emphasis supplied.]
> Pet. Supp. App. at 8.

Thus, the court of appeals viewed the Commission's action as merely achieving, through generic means, an adjustment of jurisdictional pipeline rates due to changes in R&D costs. After analyzing the procedure used and concluding that its result was truly the regulation of pipeline rates subject to FERC jurisdiction, and not the regulation of GRI itself, the court held Petitioner's argument to be unduly restrictive and to exalt form over substance.

The court of appeals also found that the FERC was free to pursue generic means of pipeline rate regulation under the NGA. On this point, the court held that the FERC's authority to exercise its rate regulation powers under the NGA generically has been upheld on numerous occasions, citing *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), among other cases.

Petitioner persists in its argument and adds a new point, *viz.* that *Permian*, which deals with *producer* rate regulation under Sections 4 and 5 of the NGA, does not constitute authority for the proposition that the FERC may pursue generic means of *pipeline* rate regulation. In this contention, Petitioner unduly

restricts the scope of the Court's holding in *Permian*. In *Permian*, this Court specifically held that the FERC was free to utilize generic means of regulating producer rates. *Permian* also held that the Commission is free to pursue whatever regulatory means it has at its disposal in meeting its regulatory obligations so long as they comport with pertinent Constitutional and statutory constraints. Given that the very same practical and statutory constraints operate in this case as were present in *Permian* and that no Constitutional issues are involved in this case, Petitioner is clearly hard-pressed to justify its contention that the generic regulation of rates is permissible under the NGA for one class of "natural gas company" — producers, whereas it is not for another class of "natural gas company" — pipelines.

Any doubt as to the merit of Petitioner's contention on this point is resolved by this Court's holding in *Mobil Oil Corp* v. *FPC*, 417 U.S. 283 (1974) in which the FPC's order *inter alia* establishing minimum rates for the transportation of liquefiable and other hydrocarbons for *all* interstate pipelines was specifically affirmed. (*Id.* at 299, 330).

Quite clearly, the court of appeals has correctly applied *Permian* and reached the proper result as to the nature and effect of the FERC's opinion and the authority of the FERC to utilize a generic procedure. Petitioner's arguments on this point, therefore, do not constitute sufficient cause for granting its petition.

B. The Court Of Appeals has Correctly Applied *Pennzoil*, *Colorado Interstate* and *Panhandle*.

Petitioner contends that the court of appeals erred in affirming the FERC's Opinion No. 64 to the extent that the opinion adjusts pipeline rates to cover the costs of R&D activities designed to supplement supplies and to increase the efficiency of natural gas use. The court held that, while such activities are "nonjurisdictional" in the sense that the FERC has no authority

under the NGA to regulate them directly, nonetheless they serve the fundamental purpose of the NGA, as identified by this Court in *California* v. *Southland Royalty Co.*, 436 U.S. 519, 523 (1978), of assuring an adequate supply of natural gas at reasonable prices; promise benefits to natural gas consumers; and, therefore, may be taken into account in regulating pipeline rates.

Relying upon such opinions of this Court as *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508 (1979), *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945), and *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945), the court concluded that the FERC's authority to take particular items into consideration in determining and regulating rates pursuant to the NGA is *not* limited by its statutory authority to regulate the items themselves, but only by the extent to which such items aid in enhancing the regulated service. Having determined that Petitioner's proposed jurisdictional standard does not comport with pertinent precedent, the court then determined that the FERC's order is consistent with standards that do apply. It held that the Commission's order does promise benefits to natural gas consumers and that it serves the NGA's fundamental purpose of assuring an adequate supply of natural gas at reasonable prices, citing *Southland, supra*.

Petitioner persists in its more restrictive view of the FERC's rate regulation authority, maintaining that the court of appeals' disposition of the issues in this case, and particularly its use of the *Pennzoil, Colorado Interstate*, and *Panhandle* Opinions, "reveal the Court's misunderstanding of the above opinions of this Court, the facts in Docket No. RP79-75 and the Colorado Commission's argument." Pet. at 9.

A brief discussion of the referenced Opinions, and Petitioner's arguments relating to them, reveals that Petitioner does not deny the proposition for which the court cited them, i.e., that the FERC has authority to take "nonjurisdictional" costs and

activities into account in determining jurisdictional rates. In this connection, Petitioner does not contend that these opinions fail to support the proposition for which the court cited them. Rather, Petitioner's sole complaint is that the Court fails to address Petitioner's basic dissatisfaction with the FERC's exercise of its discretion, i.e., to determine which nonjurisdictonal items relate directly enough to jurisdictional service to warrant coverage in the rates for that service.

In *Pennzoil*, it was held that, while royalty payments made by producers were not subject to the FERC's direct control, nonetheless they were appropriately taken into consideration in establishing jurisdictional rates. Petitioner explains this result by emphasizing that such royalty costs become part of the producers' costs of doing business and, therefore, are appropriately taken into consideration in establishing both producer rates and pipeline rates. Petitioner would distinguish *Pennzoil* from the instant case, however, by maintaining that the R&D costs involved here are not costs of rendering jurisdictional service. And yet the effect of the FERC's order is a determination that they are just that. It is this refusal to give credence to the FERC's determination that the R&D expenditures here involved constitute true costs of conducting interstate pipeline business that lies at the heart of the controversy on this point. Rather than supporting Petitioner's narrow view, *Pennzoil* emphasizes the FERC's wide discretion in exercising its rate regulatory authority pursuant to the NGA. *Id.*, 439 U.S. at 517-518.

As conceded by Petitioner, *Colorado Interstate* also stands for the proposition that the FERC may treat nonjurisdictional expenditures, in this instance those associated with production and gathering activities, as among the costs of jurisdictional service. Again, however, Petitioner insists that the R&D costs involved in this case may not be so treated.

Pennzoil and *Colorado Interstate*, rather than supporting Petitioner's contention on this point, represent two of several

opinions of this Court which stand for the proposition that it is for the FERC, through the exercise of its informed discretion, to determine which nonjurisdictional expenditures constitute costs of jurisdictional business. Petitioner's attempt to severely restrict the FERC's discretion in this area thus draws no support from either *Pennzoil* or *Colorado Interstate*.

Petitioner's use of *Panhandle* is somewhat more instructive in clarifying the controversy on this point. The court of appeals cited *Panhandle* as further authority for the proposition that concededly nonjurisdictional items, in that case *direct* sale profits, may affect jurisdictional resale rate regulation. Petitioner, however, uses *Panhandle* for the proposition that the FERC must distinguish between regulated and unregulated business aspects of companies subject to its jurisdiction. On this basis, Petitioner erroneously concludes that the R&D costs at issue relate to unregulated business activities of GRI's pipeline members and, therefore, can never be legitimately treated as costs of jurisdictional business. The FERC and the court of appeals, however, found to the contrary.

The court of appeals' reasoned analysis of the FERC's order on this point more than suffices to demonstrate that both the regulated entities and their jurisdictional customers stand to benefit from the R&D activities at issue, and that they comport with the fundamental purpose of the NGA. Petitioner has failed to demonstrate that these standards are inappropriate. Moreover, its simple dissatisfaction with the exercise of the FERC's discretion to determine appropriate costs of doing jurisdictional business does not constitute good cause for granting its petition.

II

PETITIONER'S CONTENTION THAT THE COURT OF APPEALS HAS INCORRECTLY INTERPRETED ITS OWN OPINION IS UNFOUNDED AND DOES NOT CONSTITUTE SUFFICIENT CAUSE FOR GRANTING ITS PETITION

Petitioner contends that the court of appeals has been inconsistent: reversing the FERC in a similar case, *Office of Consumers' Counsel* v. *FERC*, 655 F.2d 1132 (1980), while affirming the FERC in this case. Although it is not at all apparent from Colorado's petition, it is nevertheless a fact that the court of appeals devoted a substantial portion of its opinion to distinguishing the instant case from the earlier *Consumers' Counsel* case. The panel of the court of appeals that heard this case below, which included one Judge who was on the *Consumers' Counsel* panel,[6] found several significant distinctions between the two cases and held that this case fits comfortably within the rationale articulated in *Consumers' Counsel*.

The court of appeals found that the differences between the *Consumers' Counsel* case and this one to be readily apparent and to include (1) the scope and purpose of the statutory provisions involved, (2) the intended result of the endeavors involved (a commercially viable, nonjurisdicional business venture in *Consumers' Counsel*, as opposed to the multifaceted approach to maintaining and improving jurisdictional services through supply enhancement and cost containment involved in this case), and (3) the character of the FERC's involvement (actively participating in the building, financing and operation of a large scale commercial synthetic fuel operation in *Consumers' Counsel*, and exercising its traditional pipeline rate regulation authority in this case). The court of appeals also identified language in its *Consumers' Counsel* opinion which

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[6] Hon. Abner J. Mikva sat on both panels.

clearly indicates that the result reached in this case comports well with the rationale used in that opinion:

> As we have noted, *supra* at p. 10, all 26 R&D project areas in this case have as their broad goal the conservation of gas supplies, and we deem this to be within FERC's Section 4 authority to promote, since it results in increasing the supply of natural gas available to the nation's natural gas consumers. Taken as a whole, GRI's R&D program constitutes one of those situations where FERC may permit "the charging to current ratepayers of expenditures incurred by a jurisdictional company on [an] RD&D experiment even before the experiment bears fruit." *Office of Consumers' Counsel, supra,* slip. op. at n.32.
> Pet. Supp. App. at 16 n. 13.

In view of these factors, the court of appeals found that the cases should be distinguished and the FERC affirmed. The court held that, to limit research in accordance with Petitioner's reading of *Consumers' Counsel*

> . . . would not only be unduly restrictive but would ignore the reality that natural gas supplies are being exhausted and are not renewable. In order to make natural gas available in the future, some sort of conservation must be exercised and the best alternatives studied and selected. The Supreme Court has stated that "[t]he fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices." *California* v. *Southland Royalty Co.*, 436 U.S. 519, 523 (1978). Limiting research by GRI solely to areas of natural gas production would appear insufficient in assuring such an adequate and reliable supply at reasonable prices.
> Pet. Supp. App. at 16-17.

Clearly, what Petitioner characterizes as an inconsistency in the two decisions is neither a conflict between circuits of the court of appeals nor even a conflict between panels of the same circuit. Rather, it amounts to nothing more than an over-broad

and inaccurate construction of the *Consumers' Counsel* opinion.

Nor can it properly be contended that the Commission's decision approving the GRI charge can only be reviewed in the Court of Appeals for the District of Columbia Circuit. As the Commission and the court below have, heretofore, established, GRI is acting as an *agent* for, and on behalf of, its 29 interstate pipeline members. Since its interstate pipeline members are all "natural gas companies" within the meaning of the NGA, any person who is aggrieved by the Commission's order may also seek court review of the Commission's action in any of the other circuits which would be available to them under Section 19(b) of the NGA.[7]

Yet another ground exists for rejecting Colorado's petition on this point. It goes to the proper coordination and administration of judicial business before the United States Court of Appeals for the District of Columbia Circuit.[8] Petitioner has raised its contention that *Consumers' Counsel* controls this case on two previous occasions: first in argument before the court of appeals prior to its decision and again on rehearing. On both occasions, the court of appeals ruled against Petitioner on this point. Now, Petitioner presents the same point to this Court as an independent reason for granting its petition. GRI respectfully submits that even assuming, *arguendo*, that Petitioner's contention has merit, it nonetheless does not constitute a sufficient basis for granting the petition.[9] Clearly, if Petitioner was

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[7] § 19(b), 15 U.S.C. § 717r(b), provides that, in addition to the District of Columbia Circuit, review may be sought by an aggrieved party in any circuit in which the natural gas company to which it relates is located or has its principal place of business.

[8] See F.R.A.P. Rule 35(a) and U.S. Ct. of App. D.C. Cir. Rule 14(a).

[9] See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). See also R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 4.6 (5th ed. 1978).

to have yet another opportunity to argue this point, its recourse was appropriately to the court of appeals sitting *en banc* and not to this Court on writ of certiorari. [10]

CONCLUSION

In view of the foregoing, the petition for a writ of certiorari should be denied.

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[10] The court below granted Petitioner an extension of time to file a petition for rehearing *and* a suggestion for rehearing *en banc*. Although a petition for rehearing was filed, Petitioner has failed to file a suggestion for rehearing *en banc*.

Intervenor's Opposition 2

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No. 81-1425

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF INTERVENOR INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC), pursuant to its authority under the Natural Gas Act (NGA), may approve, on a generic, rather than on an individual, basis, interstate natural gas pipeline rate adjustments proposed by a research and development planning and management organization on behalf of, and as agent for, its interstate natural gas pipeline members?

2. Whether the FERC, pursuant to its authority under the NGA, may approve rate adjustments based upon the costs of research and development (R&D) activities which serve the NGA's fundamental purpose of assuring an adequate supply of natural gas at reasonable prices through exploring new means of enhancing supply and increasing the efficiency and economy of gas usage?

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BRIEF OF INTERVENOR INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN OPPOSITION

STATEMENT

Interstate Natural Gas Association of America adopts the Statement presented in the Brief of Intervenor Gas Research Institute.

INTEREST OF RESPONDENT

The Interstate Natural Gas Association of America (INGAA) is a non-profit national trade association representing virtually all of the major long-distance natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC) under the Natural Gas Act (15 U.S.C. § 717, *et seq.*), the Department of Energy Organization

Act (42 U.S.C. § 7101, *et seq.)* and the Natural Gas Policy Act (15 U.S.C. § 3301, *et seq.)*. Most, if not all, of these companies are also members of the Gas Research Institute (GRI). INGAA, an intervenor in the court below, submits that the Public Utilities Commission of the State of Colorado's (Colorado or Petitioner) Petition for Writ of Certiorari fails to demonstrate any good cause for being granted, and accordingly should be denied.

ARGUMENT

I. The Court Of Appeals Properly Ruled That The Commission Had Authority To Accept And Rule On An Application For A Rate Increase Submitted by GRI On Behalf Of Its Jurisdictional Members.

Petitioner incorrectly bases its argument on the fact that the GRI is not a "natural gas company" as that term is defined in Section 2(6) of the Natural Gas Act and therefore the Commission does not have jurisdiction over its proposed rate increase. The court of appeals correctly found this argument "to be unduly restrictive and to exalt form over substance." (Slip Op. at 8). Moreover, it reflects a basic lack of understanding as to the GRI's purpose and the consistency of that purpose with the opinions of this Court.

In June of 1976, the Federal Power Commission (FPC), predecessor to the FERC, issued a Notice of Proposed Rulemaking in Docket No. RM76-17 entitled, "Research and Development, Advanced Approval of Rate Treatment — ACCOUNTING-RULEMAKING, RESEARCH AND DEVELOPMENT". In the Notice, the Commission:

> "recognized[d] the need for a significantly expanded national energy research and development program as part of the solution to the Nation's problem of increas[ed]

imbalance between energy supply and demand" (Notice, 41 Fed. Reg. 25914 (June 23, 1976)).

The Commission acknowledged that in the past, jurisdictional companies had to seek R&D expenditures through individual rate filings pursuant to Section 4 of the NGA. This was so even if they were in a joint venture with other jurisdictional companies. It noted that:

> "Since the justification for advance approval of rate treatment for R&D expenditures would be the same whether provided by the R&D organization once or by the jurisdictional companies many times individually, a single request by the organization would reduce the paperwork burden on the R&D organization, the jurisdictional companies, and the FPC and would afford each the opportunity to concentrate more on assuring the quality and value of the R&D efforts undertaken." (Notice, p. 4).

Then in its Order No. 566 (13 F.P.S. 5-542) prescribing the changes in accounting and rate treatment for research, development and demonstration expenditures (RD&D or R&D), the Commission said that through this rulemaking it:

> " . . . intended specifically to stimulate R&D effort by jurisdictional companies by clarifying the Commission's rate review and accounting procedures and by providing an opportunity for simplifying proceedings before the Commission *by allowing advance approval of the R&D program of organizations which derive financial support from jurisdictional companies*." *(Id.* at 1) (Emphasis supplied).

Thus, from the inception of the Commission's RD&D policy, it is clear that the Commission was not making any attempt to relinquish its jurisdictional responsibilities, but rather was striving to make its regulatory functions relating to those responsibilities more efficient and responsive to the Nation's energy needs. This was properly recognized by the court of appeals as a seemingly "rare instance of a government agency trying to cut red tape, and about which we all too often hear,

only to be penalized for trying to streamline procedures." (Slip Op. at 8).

It was in response to the need for increased RD&D by the natural gas pipeline industry that the GRI was established as the RD&D arm of the industry; and, as such, an agent of the pipelines. In such capacity the GRI was not intended to be a natural gas company. However, its interstate pipeline members are; and, as a result, have their rates regulated by the Commission pursuant to Sections 4 and 5 of the NGA. The Commission's approval of the GRI's RD&D program constitutes an approval for rate making purposes of the RD&D expenditures by the natural gas company members of the GRI so that they do not have to seek approval of such expenditures in each of their individual rate cases. The court of appeals correctly recognized this as a proper exercise of the Commission's authority through generic means to recoup RD&D costs. In addition, the court of appeals found this generic approach wholly consistent with this Court's opinion in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and others.

Petitioner argues that this Court's ruling in *Permian* is not in point because it applies specifically to producers which are natural gas companies as defined in the NGA; whereas GRI is not a natural gas company. This argument fails to recognize the fact that the FERC is not seeking to regulate the GRI, but rather to regulate generically the amounts to be allowed for RD&D expenditures to interstate pipelines which are natural gas companies pursuant to Section 2(6) of the NGA.

The court of appeals has properly applied this Court's precedent and appropriately interpreted the Commission's authority relative to generic procedures for rate making purposes. Accordingly, Petitioner's arguments relative thereto are without merit.

2. The Court Of Appeals Properly Found That The FERC May Take Into Consideration Nonjurisdictional Items When Setting Jurisdictional Rates.

The court of appeals found that this Court has on numerous occasions "held that the FERC, and its predecessor, the FPC, may take into consideration nonjurisdictional items when setting jurisdictional rates"[1] (Slip Op. at 12). Petitioner seeks to distinguish these cases from the instant one on the basis that none of the nonjurisdictional items will ever come within the jurisdictional business of a natural gas company or otherwise fall within the Commission's jurisdiction. (Petition at 9). This attempt at discrediting the lower court's findings is grossly limited. It ignores the recurring theme in the opinion in each of these cases that it is for the Commission's informed judgment and expertise to determine which nonjurisdictional expenditures constitute costs of jurisdictional business. It also ignores the very relevant statement by the court of appeals that:

> "To limit research projects to the production or transportation of natural gas would not only be unduly restrictive, but would ignore the reality that natural gas supplies are being exhausted and are not renewable. In order to make natural gas available in the future, some sort of conservation must be exercised and the best alternatives studied and selected. *The Supreme Court has stated that '[t]he fundamental purpose of the Natural Gas Act* is to assure an adequate and reliable supply of gas at *reasonable prices.' California* v. *Southland Royalty Co.*, 436 U.S. 519, 523 (1978). *Limiting research by GRI solely to areas of natural gas production would appear insufficient in assuring such an adequate and reliable supply* at reasonable prices." (Slip Op. at 17) (Emphasis supplied).

Here again Petitioner's argument is without merit.

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[1] *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508 (1979), *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945) and *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945).

3. The Court Of Appeals Properly Distinguished This Case From Another Of Its Opinions.

Petitioner contends that the court of appeals' opinion in the instant case is inconsistent with that court's opinion in *Office of Consumers' Counsel* v. *FERC*, 655 F. 2d 1132 (1980) hereinafter referred to as the *Great Plains* case. However, the court of appeals distinguishes the two cases in considerable detail (Slip Op. at 13-17) and in doing so points out, *inter alia*, that:

> "GRI does not here request from FERC certifications under Section 7 for its projects. On the contrary, only ratesetting for jurisdictional companies acknowledgedly within Section 4 jurisdiction is at issue here, and FERC's discretion and authority under the two sections are not necessarily coextensive. In this case FERC is not seeking to regulate the construction or operation of any project; in fact, GRI's research and development program does not include a single commercial demonstration project. Unlike *Great Plains*, also, where two FERC staff people were assigned full-time to Great Plains home office to oversee construction of the plant, GRI's research will be carried on without extensive supervision. GRI is not putting all of its eggs in one basket by devoting all of its resources to one risky venture, or to synthetic fuel (let alone one particular type of synthetic fuel), or to solar energy, etc. It has steered a course of moderation which includes areas of natural gas research, synthetic gas, gas efficiency, etc. If GRI's research results in gas saving appliances, or water heaters, or the ability to use solar-assisted appliances which would result in gas savings, it is clear that rate paying customers would be benefited." (Slip Op., at 15).

Moreover, a member of the panel in the *Great Plains* case was also a member of the panel in the instant case. Clearly, there is no merit to Colorado's argument on this point.

CONCLUSION

The decision of the court of appeals is correct, does not conflict with the decisions of this Court or any other court, and does not warrant review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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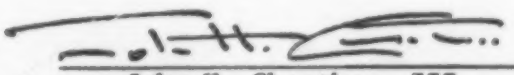

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, GAS RESEARCH INSTITUTE, NORTHERN DISTRIBUTION GROUP, AMERICAN GAS ASSOCIATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-1425

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, GAS RESEARCH INSTITUTE, NORTHERN DISTRIBUTION GROUP, AMERICAN GAS ASSOCIATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Amicus Curiae The Public Service Commission of the District of Columbia ("The D.C. Commission") respectfully suggests that the court should issue a writ of certiorari to the United States Court of Appeals for the

District of Columbia Circuit to review that court's judgment affirming, on petition for review, Opinion No. 64 of the Federal Energy Regulatory Commission.*

STATEMENT OF INTEREST OF AMICUS CURIAE

(a) The D.C. Commission and Natural Gas Companies.

The D.C. Commission, like other state and local public utility regulatory agencies, has the authority and responsibility for the regulation of pubic utilities doing business in the District of Columbia.[1] The essential function and purpose of the D.C. Commission is

> . . . To insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished. . .shall be reasonable, just and nondiscriminatory.[2]

Among the utilities subject to regulation by the D.C. Commission is the Washington Gas Light Company

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*The Commissioners of the Idaho Public Utilities Commission, the Kansas State Corporation Commission and the Montana Public Service Commission are familiar with the issues being presented in the Public Utilities Commission of Colorado's petition for a writ of certiorari and with the arguments which are being presented in this brief. They have requested the Public Service Commission of the District of Columbia to inform the court that they join it in urging the court to grant the writ in this case.

[1]D.C. Code §§ 43-401 *et seq.* (Michie Ed. 1981).

[2]D.C. Code § 43-402.

("WGL"), which is engaged in the distribution and sale of natural gas for light, heat and power in the District of Columbia.[3]

Accordingly, the D.C. Commission regulates, among other things, the rates charged by WGL to customers in the District of Columbia. Indeed, in the regulation of WGL's rates, the statute establishing the D.C. Commission invests the D.C. Commission "with the same basic authority as is possessed by the Federal Power Commission [now the Federal Energy Regulatory Commission ("FERC")] under the Natural Gas Act."[4] *Washington Gas Light Co. v. Baker,* 88 U.S. App. D.C. 115, 188 F.2d 11, (D.C. Cir. 1950), *cert. den.* 340 U.S. 952 (1951).

WGL purchases natural gas from Columbia Gas Transmission Corp. ("Columbia"), Crabrun Gas Co. ("Crabrun"), Frederick Gas Co., Inc. ("Frederick"), and Transcontinental Gas Pipe Line Corp. ("Transco."), companies engaged in the transportation and sale for resale of natural gas in interstate commerce and thus natural gas companies under the Natural Gas Act.[5] The rates charged WGL by Columbia and Transco presumably must ultimately be allowed by the D.C. Commission in setting the rates to be paid by ratepayers in the District of Columbia. The D.C. Commission is therefore interested in the rates approved by FERC and, perforce, the costs that FERC allows WGL's pipeline suppliers to pass on to WGL and, ultimately, to the D.C. ratepayers. At issue in this case is the approval by FERC of the expenses of the Gas Research Institute ("GRI") as part of the rates that natural gas com-

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[3]See D.C. Code §§ 43-203, 43-213.

[4]15 U.S.C.A. § 717c(a).

[5]15 U.S.C.A. § 717a(6).

panies, including Columbia and Transco, may charge their customers, including WGL.

(b) The D.C. Commission and the Gas Research Institute

In a recent WGL rate case[6] the D.C. Commission permitted WGL to recover the GRI expense charged to it by its pipeline suppliers, Columbia and Transco, at the level established on the record in that rate case.[7] The D.C. Commission, however, refused to allow WGL to recover at the higher level established by FERC, but set after the record in that rate case was closed.[8] In order to recover the increased sum, WGL would have to commence an appropriate rate change proceeding.

The D.C. Commission believes that it has an obligation to inquire into the reasonableness of expenses such as charges for GRI where those expenses are proposed to be included in rates charged to D.C. ratepayers. At the same time, the D.C. Commission was aware of the pendency of this case when it decided the recent WGL rate case, and the D.C. Commission recognizes that, if this court sustains FERC's actions, the D.C. Commission will have to defer to FERC and forego that inquiry. It was the unsettled state of the law that caused the D.C. Commission to

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[6]D.C. Commission Formal Case No. 722. The Commission's Order Nos. 7193, 7209 and 7237 in that Formal Case have been appealed on various grounds, including the D.C. Commission's rate treatment of the GRI expense which FERC had allowed to be collected from WGL. The relevant portions of those orders are set out in the Appendix. The appeal has been briefed and argued in the District of Columbia Court of Appeals. (See D.C. Code §§ 43-904 – 43-909.). The decision (No. 81-229) is pending.

[7]D.C. Commission Order Nos. 7193, 7209, and 7237.

[8]D.C. Commission Order Nos. 7209 and 7237. That refusal is at issue in No. 81-229. See n.6, *supra*.

take a middle ground approach in the WGL rate case. Accordingly the D.C. Commission is acutely interested in the outcome of this case.

SUMMARY OF ARGUMENT

By assuming jurisdiction to regulate on a subject never conferred on it, FERC has not only exceeded its powers under the Natural Gas Act, but has done so at the expense of State and local regulatory jurisdiction, because, once FERC has properly approved a charge on wholesale rates, state and local regulators lack the power to remove that charge from retail rates. Moreover, in doing so FERC has substituted the very loose examination of GRI expenses which is characteristic of its ratemaking for the close scrutiny with which state and local regulatory commissions examine expenses of retail natural gas sellers.

The court of appeals' decision in this case – sustaining FERC power to provide rate treatment for a wide range of projects most of which have nothing to do with the production or transportation of natural gas – directly conflicts with its earlier decision in *Office of Consumers' Counsel v. FERC*, ____ U.S. App. D.C. ____, 655 F.2d 1132 (1980), in which the same court of appeals denied FERC regulatory jurisdiction over non-natural gas fuels. This intra-circuit conflict is particularly important for this court to resolve when it is realized that the District of Columbia Circuit is the only circuit which has jurisdiction to review FERC's assumption of jurisdiction over non-natural gas companies.

ARGUMENT

1. *Federal - State Relations.* The importance of the decision of the court of appeals in this case must be

understood in the context of the balance which exists between federal and state regulation of interstate natural gas sales.[9] F.E.R.C. has jurisdiction under Sections 2 and 4 of the Natural Gas Act to set rates for companies engaged either in the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale. Neither F.E.R.C. nor the court of appeals nor GRI have ever claimed that GRI fell under the foregoing definition of "Natural Gas Company." Rather, it has been conceded to be a research and development organization.

It is commonly understood that, when F.E.R.C. authorizes a charge to be placed onto the wholesale price of natural gas, regulators of companies engaged in retail resale of natural gas must permit that charge to be passed onto consumers as part of the cost of fuel. See *Narragansett Electric Company v. Burke,* 381 A.2d 1358 (R.I. 1977), cert. denied 435 U.S. 972 (1978). Conversely, where F.E.R.C. does not pass on, and authorize rate treatment of, a charge, state regulatory commissions have both the jurisdiction and obligation to inquire into the reasonableness of the charge before it is built into the retail price of natural gas. As a result, any increase in F.E.R.C. regulatory jurisdiction works a corresponding decrease in the regulatory jurisdiction of state regulators; F.E.R.C.'s usurpation of authority comes at the cost of reducing the authority of state regulators. In this instance, it deprives state regulators of the right to indepedently inquire into whether GRI's expenditures have any potential to benefit their natural gas ratepayers.

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[9]While the D.C. Commission is not a "state" regulatory body and was created by Act of Congress, it functions in regulating retail natural gas sales in the same manner as a state commission.

2. *Different Approaches to Ratemaking.* The D.C. Commission, like most state utility regulatory authorities, closely scrutinizes expenses sought to be charged to ratepayers to make sure that the ratepayers in fact benefit from those expenses. See, e.g., *Atlantic Tel. Co. v. Public Service Comm'n,* 390 A.2d 439 (D.C. App. 1978). The question is whether — if at all — that close scrutiny should be dispensed with in favor of some looser theory of oversight that does not subject expenses sought to be charged to ratepayers to a detailed review. The question becomes all the more acute in light of the very purpose for enacting the Natural Gas Act:

> There can be no dispute that the overriding congressional purpose was to plug the 'gap' on regulation of natural - gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural - gas business. *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 683 (1954).

and thus

> Protection of consumers against exploitation at the hands of natural — gas companies was the primary aim of the Natural Gas Act. (347 U.S. at 685).

The legislative history, referred to in *Phillips, supra,* put it as follows:

> The states have of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The states have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales

> being considered local in character and in the absence of congressional prohibition subject to state regulation . . . There is no intention in enacting the present legislation to disturb the states in their exercise of such jurisdiction. . .' 347 U.S. at 683-684, n.13, (quoting from congressional committee reports)

If state regulation is to remain undisturbed, then that close scrutiny, an element of state regulation, must remain undisturbed as well. Close scrutiny is the way to protect consumers against exploitation at the hands of natural - gas companies.

However, in 18 C.F.R. § 154.38(d)(5)(i) through (v) and in Opinion No. 11 (March 22, 1978), FERC dispensed with that close scrutiny when passing on or determining the rate treatment of GRI expenses which are ultimately paid by consumers who are entitled to the benefit and protection of close regulatory scrutiny, adopting instead the vague test that there be a "reasonable chance" that the expenses will benefit the ratepayers "in a reasonable period of time." The actions of the FERC may effectively foreclose careful and detailed assessment of ratepayer benefit, since state agencies, like the D.C. Commission, may be bound to accept FERC's judgment about GRI expenses, even though those expenses were not subject to close scrutiny and even though the state agency was willing and prepared to undertake a close scrutiny.

Accordingly, this case is important not only because it preempts state and local regulation, but because it changes the entire approach to ratemaking.

3. *Intra-Circuit Conflict.* The decision below is directly inconsistent with *Henry v. F.P.C.,* 168 U.S. App. D.C. 137, 513 F.2d 395 (1975) and *Officer of Consumers'*

Counsel v. F.E.R.C., ___ U.S. App. D.C. ___, 655 F.2d 1132 (1980).

In *Henry, supra,* three applications were filed before FERC pursuant to § 7(c) of the Natural Gas Act[10] for certificates of public convenience and necessity. The facilities involved included plant for the manufacture and transportation of synthetic gas and plant for the mixing of synthetic and natural gas. The court, affirming the FPC, held that the FPC had no jurisdiction over plant devoted to the production or transportation of synthetic gas prior to its mixture with gas from wells, i.e. natural gas.

In *Office of Consumers' Counsel, supra,* a consortium of natural gas companies sought a § 7(c) certificate for a coal gassification plant, and a pipeline to transport the synthetic gas to a point where it would be commingled with natural gas and sold. FERC granted the application. On Appeal the District of Columbia Circuit reversed, holding on the basis of *Henry* that FERC had no regulatory jurisdiction over any aspect of synthetic gas production or development prior to its commingling with natural gas. FERC had argued that its action merely authorized future sales of commingled gas. The Court rejected the argument, finding that the proposal at issue was in fact a financing device rather than a gas supply project, that the hypothetical sale of commingled gas was remote in time, place and even probability, and that FERC would regulate the plant during the construction and pre-operation period, a time during which, of course, there would be no synthetic gas from the plant to mix or commingle with natural gas.

It is entirely clear, in light of *Henry* and *Office of Consumers' Counsel,* that FERC has no regulatory jurisdiction

[10] 15 U.S.C.A. § 717f(c).

of synthetic gas plant. And yet the court below has held that FERC can nevertheless regulate and guarantee rate treatment for synthetic fuel research development and demonstration and for research into appliance, performance and technology, even though few of the 26 research activities cited in the opinion on review are jurisdictional and even though none of them are any more closely related to a jurisdictional event – the transportation or sale for resale of natural gas – than was the plant at issue in *Office of Consumers' Counsel.*

While it might be desirable for FERC to administer a synthetic fuels program, Congress has not asked it to do so. Congress made other plans. *Henry* and *Office of Consumers' Counsel* understand that. The court below did not. Accordingly it is important that this Court determine the regulatory authority of FERC with respect to the production of synthetic gas.

4. *The Need to Resolve This Intra-Circuit Conflict.* We have argued above – and the Petitioner has argued[11] – that the decision of the court of appeals in this case is in conflict with the same court's earlier opinion in *Office of Consumer's Counsel v. Federal Energy Regulatory Commission,* ____ U.S. App. D.C. ____, 655 F.2d 1132 (1980). While there has been some expression that an intra-circuit conflict is for the court of appeals itself to resolve through its *en banc* procedure,[12] the existence of such a conflict must be weighed with other factors in deciding whether to grant certiorari. For example, the combination of an intra-

[11]Petition for a writ of certiorari, pp. 11-12.

[12]In *Davis v. United States,* 405 U.S. 933 (1972), the court denied certiorari when the solicitor general so argued. See *Davis v. United States,* 417 U.S. 333, 340 (1974). *Davis,* however, was a criminal case in which the litigant could and did present the issue again in a collateral proceeding. That is not the case here.

circuit conflict with an important question does justify the issuance of a writ of certiorari. See *John Hancock Ins. Co. v. Bartels,* 308 U.S. 180, 181 (1939). See also *Scott v. United States,* 436 U.S. 128 (1978), in which the combination of conflicting views among the judges of the District of Columbia Circuit and the importance of the question led this court to grant certiorari where it had earlier denied the writ to the same issue presented on interlocutory review. In addition, where the area of the law is a specialized one and the problems have arisen and will continue to arise within one circuit,[13] it is most appropriate for this court to exercise its discretion to intervene and resolve the conflict. See *Maggie v. Zeitz,* 333 U.S. 56, 59-60 (1948).

The latter category applies particularly to this case and the court from which it comes. In most instances, decisions of F.E.R.C. are reviewable either in the District of Columbia Circuit or the circuit in which the natural gas company is located or has its principal place of business. See *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33 (1964); 15 U.S.C. § 717 r(b). In this case, however, both the court of appeals and F.E.R.C. have held that GRI, though subject to regulation, is not a natural gas company. As a result, the District of Columbia Circuit is the only court of appeals which has jurisdiction to review F.E.R.C. decisions concerning GRI; those disagreeing with its decisions will never have an opportunity to create an inter-circuit conflict as a basis for bringing the question here.

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[13]In this instance, while the decision below was written for the District of Columbia Circuit, it was authored by a visiting district judge.

The combination of the importance of the basic question presented by this case with the uniqueness of the District of Columbia Circuit's role in reviewing F.E.R.C. decisions should weigh heavily toward a grant of the writ of this case.

CONCLUSION

The court should grant the writ of certiorari sought by the Colorado Commission.

Respectfully Submitted,

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Appendix

APPENDIX

Excerpt from Proposed Final Order in F.C. No. 722

Order No. 7193

F. *Gas Research Institute*

The Gas Research Institute (GRI) was formed in 1977 to coordinate and accelerate critically needed research into gaseous fuels. It replaced the American Gas Association's efforts in this area. The membership of GRI consists of 137 distribution companies, 28 interstate pipeline companies and 24 municipal utilities and represents the vast majority of gaseous fuel suppliers in the United States. WGL is a member as is Columbia and Transco, WGL's pipeline suppliers. The research and development program under GRI is reviewed by its advisory council, research coordination panel, industry technical advisory committee, and municipal gas system advisory committee, which evaluate GRI research from the viewpoints of economic, consumer, environmental, scientific, industrial and regulatory interests.

WGL states that each year GRI submits its five-year research plan and budget to FERC for review and approval to insure that its activities are prudent, well-designed, and in the public interest. Once approved, the costs of funding the research program are embodied in the wholesale cost of gas. WGL is thereafter assessed by its pipeline suppliers for these charges as part of its gas bills. WGL's portion of the charges as part of its gas bills. WGL's portion of the costs through October 1979 which is allocated to the District of Columbia operations is $93,000 (WGL Exh. H, p. 7). However, GRI's budget continues to

grow throughout its most recent five-year forecast period and, with it, WGL's share. Thus, WGL's projected contributions to G.R.I. on a D.C. basis are $127,109 for 1980, $175,665 for 1981, $213,930 for 1982, $246,846 for 1983, and $254,162 for 1984 (OPC brief, p. 233.)

WGL argues that a utility is entitled to charge all of its legitimate operating expenses to its ratepayers and that its GRI assessment is no different than the expenses it incurs for any other utility operation. It cites *Mississippi Fuel Corporation v. FPC,* 163 F.2d 433 at 437 (D.C. Cir. Ct. 1947) and *West Ohio Gas Company v. Ohio Public Utilities Commission,* 294 U.S. 63 at 72 (1975) for the proposition that the allowed return on investment, which is that amount over and above expenses, must be provided and that the court – and presumably this regulatory agency – should not substitute its judgment for a utility's as to the appropriate amount of an expenditure.

WGL claims that were it not to pay its assessment it would not be able to buy its gas supplies, in that the assessment is merely one component of WGL's commodity cost of gas which it is legally entitled to recover. WGL claims that neither the District of Columbia Commission nor the company has any control or any right of control over the company's commodity costs except to the extent that each, by intervention in federal rate proceedings, exercises its powers of persuasion.

WGL maintains that the GRI research and development programs benefit the ratepayers by improving the gas supply, promoting the conservation of natural gas and safety programs, improving environmental quality, and eliminating fragmented and often duplicative research which individual companies might otherwise undertake. In view of the foregoing, WGL maintains that the entire

amount allocated to GRI in its cost of service study should be allowed by the Commission.

Staff's position is similar to that of WGL. Staff argues that the Federal Energy Regulatory Commission has specifically authorized the GRI surcharge for interstate gas as a reasonably incurred operating expense under the "filed rate doctrine." The charge, staff maintains, is also recognized as a component of the legal rate charged to WGL. *Narrangansett Electric Company v. Burke,* 381 A.2d 1358, 1362 (R.I. 1977), *cert. denied* 435 U.S. 972 (1978). Staff also agrees with WGL that as the company has no realistic choice but to pay the rate included in the GRI charge, equity would demand that these increased costs be recovered in a rate adjustment.

OPC equates this issue with the AGA expense issue, in that WGL has to carry the burden on the record of the propriety of these expenses. OPC cites the case of *Re: Western Slope Gas Company* (Decision No. C79-907, 1979), a Colorado decision which denied a utility its request for automatic flow-through of the GRI assessment but did permit the company to set out the charge in the context of the general revenue investigation. OPC maintains that the record in this proceeding has failed to specify or quantity potential benefits to customers from WGL's participation in GRI. OPC submits that D.C. ratepayers can expect little or no benefits from WGL's proposed funding of GRI.

OPC maintains that the benefits of GRI will go to manufacturers first, appliance dealers second and WGL and its ratepayers third. The benefit would flow through to the ratepayer only to the extent that he utilizes and purchases the new, efficient gas appliances.

OPC contends that the Commission's duty to establish rates has not been usurped by the actions of FERC in approving the GRI budget. OPC submits that the District of Columbia Commission has independent authority to determine the ratemaking treatment of GRI on its own, irrespective of the manner in which FERC has decided the issue. OPC concedes, however, that there is controversy over the question of whether the FERC decision preempts this Commission from disallowing the GRI contribution. This preemption is being challenged in the case of *State of Colorado v. FERC* (D.C. Cir., C.A. No. 80-117). OPC would have the Commission reserve decision on this matter and render a separate decision when the legal authority issue is resolved by the court in the above captioned case.

We do not contest the viability of the proportionate assessment by WGL's pipeline suppliers of its share of GRI's annual costs. We also are aware that FERC has decided not to mandate shareholder contributions by its member companies to meet GRI's annual budgetary needs.[37] Such action, however, does not predetermine our obligation to assure that the D.C. ratepayers are charged no more than is reasonably necessary by WGL for the maintenance of safe, efficient and adequate gas service. We recognize that the GRI program may provide some benefits to ratepayers in the future. Nevertheless, insofar as the immediate consumer is concerned, these benefits are indirect at best and, in our opinion, will be substantially less to residential consumers – which comprise the majority of WGL's customers, both in terms of absolute numbers and in volumes of gas consumed – than they will

[37]Gas Research Institute, *Order Denying Request to Require Shareholder Contributions,* Docket No. RP 78-76, issued May 23, 1979.

be to industrial and commercial customers and to the gas utility companies in general.

In Order No. 6051, pp. 69-71, we considered whether certain payments made by WGL to the American Gas Association in support of its activities were properly included as an expense to be charged to WGL's ratepayers. We concluded that they should not be so charged because there was no evidence that the activities financed served to improve customer service. Although GRI's program differs in major respects from that of AGA, the principle underlying the decision on cost recovery is the same.

In our opinion WGL and its stockholders stand to receive a substantially greater benefit from the company's participation in GRI than will the customers themselves. Nevertheless, at this time WGL's share of GRI's costs is relatively small – $93,000 – and a number of activities being engaged in by GRI do hold at least a promise of providing some general benefit to all gas consumers, including those of WGL. Accordingly, we shall allow the current amount in this case as part of the wholesale commodity cost of gas to the company. Any increases above this amount will be considered in later cases. In addition, we will expect WGL to review critically GRI's annual budgetary submissions and to participate fully in any proceedings on this subject before that agency.

Excerpt from Final Order In F.C. No. 722

Order No. 7209

E. *Gas Research Institute*

In Order No. 7193 we concluded that WGL should be permitted to recover the "current amount" of the charges included in its wholesale gas costs which is utilized to meet

the operational costs of the Gas Research Institute. This current rate is 0.047 cents per therm which in 1979 amounted to $93,000, allocated to WGL's operations in the District. We also stated that any increases above the current amount ". . . will be considered in later rate cases." Order No. 7193, p. 61. WGL notes that the charges it must pay have already been increased, effective January 1, 1981, and requests that it be permitted to collect the effective GRI portion of its wholesale gas rates as fixed from time to time by appropriate authority.

WGL's exception is denied. We are aware (and were aware at the time the Proposed Opinion issued) that the per therm assessment would be increased effective January 1, 1981. Nevertheless, no increase over the current per therm charge was authorized since the increase has not been proven on the information before us and, although approved by FERC, has not been shown to be justified on a record before this Commission. Absent such justification we have no way of evaluating the merit of the increase or the proper amount to be accepted as allocable to District of Columbia ratepayers.

Excerpt From Order Denying Reconsideration in F.C. No. 722

Order No. 7237

As noted earlier, WGL objects to our decision not to reflect in these rates the increased GRI funding assessment it will begin paying on January 1, 1981, as part of its pipeline suppliers' FERC filed rates. We do not accept this adjustment as a known change, required to be reflected in these rates. Although the Supreme Court of Rhode Island in *Narragansett Electric Co. v. Burke,* 381 A.2d 1358 (RI. 1977), *cert. denied,* 435 U.S. 972 (1978), rejected an at-

tempt by that state's commission to deny recovery in retail rates of any portion of the FERC-established wholesale rates. We believe that the issue of WGL's assessment rate for the support of GRI has not been finally resolved. The FERC approved rate is undergoing judicial review. See *Colorado PUC v. FERC,* CADC, No. 80-1117; see also *Office of Consumers' Counsel v. FERC,* ___ Fed.2d ____, CADC, No. 80-1303, et al issued December 8, 1980. Assuming the revised rate is overturned, WGL, not having paid the increase, will not be required to make refunds to its customers. If the rate is sustained, WGL can seek current recovery via the filing of a proper rate change request. The fact that an exact matching of costs and revenues may not take place provides no basis for an additional allowance under existing circumstances.